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In the Supreme Court of the United States

October Term, 1968

No. 381

ALBERT J. MINICHELLO, and NICHOLAS MAURIELLO, on a Derivative Action on Behalf of Themselves and on Behalf of Other Stockholders of The First National Bank of Exeter Similarly Situated,

Petitioners

vs.

WILLIAM B. CAMP, Comptroller of Currency for the United States of America, FIRST NATIONAL BANK OF EXETER, WYOMING NATIONAL BANK OF WILKES-BARRE, AUGUST J. LIPPI, ETTORE LIPPI, JOHN LIPPI, JOHN B. CAMPBELL, GEORGE MAFFEI and HAROLD REICH,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Case Caption

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1967

No.

ALBERT J. MINICHELLO, AND NICHOLAS MAURIELLO, ON A DERIVATIVE ACTION ON BEHALF OF THEMSELVES AND ON BEHALF OF OTHER STOCKHOLDERS OF THE FIRST NATIONAL BANK OF EXETER SIMILARLY SITUATED,

Petitioners

VS.

WILLIAM B. CAMP, COMPTROLLER OF CURRENCY FOR THE UNITED STATES OF AMERICA, FIRST NATIONAL BANK OF EXETER, WYOMING NATIONAL BANK OF WILKES-BARRE, AUGUST J. LIPPI, ETTORE LIPPI, JOHN LIPPI, JOHN B. CAMPBELL, GEORGE MAFFEI and HAROLD REICH,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Plaintiffs above-named through Arthur D. Dalessandro, Joseph J. Ustynoski, Anthony C. Falvello, and Conrad A. Falvello, Esquires, their attorneys, pray that the Supreme Court of the United States issue a Writ of Certiorari to review the judgments of the United States Court of Appeals of the Third Circuit entered in the above case on September 18, 1964 (337 F. 2d 75), and one entered on May 9, 1968 (not reported), appended hereto pp. 117-119.

I.

OPINIONS BELOW

The opinions delivered in the courts below are as follows:

Opinion of the District Court for the Middle District of Pennsylvania filed July 2, 1962 (appellants' original appendix, pp. 33a-35a), and reported in 207 F. Supp. 299; Opinion of the District Court for the Middle District of Pennsylvania filed July 12, 1963 (appellants' original appendix, pp. 123a-130a), and not reported; Opinion of the Court of Appeals for the Third Circuit filed September 18, 1964 and reported in 337 F. 2d 75; Opinion of the District Court for the Middle District of Pennsylvania filed April 7, 1967 (Supp. App. 100a-115a), and reported in 266 F. Supp. 279; Opinion of the Circuit Court of Appeals for the Third Circuit of Pennsylvania filed May 9, 1968, and not reported yet. All of said opinions are appended hereto.

II.

JURISDICTION

The judgments of the Court of Appeals for the Third Circuit sought to be reviewed were made and entered on September 18, 1964 (337 F. 2d 75), and May 9, 1968 (not reported), and copies thereof are appended hereto in pp. 117-119. No order respecting a rehearing was granted, and there was no order granting an extension of time within which to petition for certiorari. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

III.

QUESTIONS PRESENTED FOR REVIEW

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1. Did the majority directors of the Exeter bank (whose leader was arrested on January 29, 1962, charged with helping to create a defalcation that resulted in the appointment of a conservator on Feb. 19, 1962) have any power or authority on February 26, 1962 between 10:00 a.m. and 12:00 noon to accept an offer of the Wyoming Bank to buy all the assets and assume all the liabilities of the Exeter Bank when on said date and time, the conservator, appointed by the Comptroller of the Currency of the United States of America, was officially and exclusively in charge of all the assets and affairs of the Exeter Bank?

2. Where the conservator did not negotiate the sale or sign the contract, did not get court approval of the sale and the purchase and sale agreement, and did not advertise return of the Exeter Bank affairs to its director, was the purchase and sale agreement of February 26, 1962, between the Exeter Bank and Wyoming Bank a valid, legally binding contract?

3. Did the Comptroller of Currency have the power to waive stockholder approval of voluntary liquidation of the Exeter Bank and stockholder approval of the sale of all of its assets where there was no actual financial or other emergency and the bank was in fact solvent?

4. Could all of the assets of the Exeter Bank which was solvent and in no financial or other emergency be sold

by six out of ten members of its board of directors without approval of the vote of shareholders owning 2/3 of the stock of the bank?

5. Can petitioners be estopped from denying the validity of the contract of sale between the Exeter Bank and the Wyoming Bank?

6. Can a national bank be placed in voluntary liquidation where there is no financial or other emergency and less than 2/3 of the shareholders vote in favor of voluntary liquidation?

7. Could a reasonable man, on the basis of facts of which he was aware or should have been aware, have reasonably concluded that an emergency existed on the morning of February 26, 1962, at the First National Bank of Exeter, Pa.?

8. Could a National Bank in conservatorship be returned to its directors by the Comptroller of Currency for the restricted and sole purpose of having the directors sell all the assets of the bank?

IV.

STATUTES INVOLVED

The pertinent portion of the National Banking Law RS 5220 (12 U.S.C. 181, 192) and of the Bank Conservation Act, 48 Stat. 2, 3, 4 (12 U.S.C. 203, 205, 208) which this case involves are set forth in the Appendix at pp. 120-125.

V.

STATEMENT OF THE CASE

This is a derivative shareholder's class action filed in the Middle District of Pennsylvania on March 6, 1962, to invalidate a sale of all assets of the First National Bank of Exeter (Exeter Bank) to the Wyoming National Bank of Wilkes-Barre (Wyoming Bank) which took place on the morning of February 26, 1962. Plaintiffs and other shareholders similarly situated are minority shareholders of the Exeter Bank. Defendants are the Exeter Bank, majority members (the Lippi group) of its Board of Directors, the Wyoming National Bank, and the Comptroller of the Currency of the United States.

On July 2, 1962, Judge Frederick C. Follmer of the Middle District Court of Pennsylvania dismissed the action against the Comptroller of Currency, and on July 12, 1963, dismissed the action against all other defendants after petitioners rested their case and after refusing to allow petitioners to submit evidence on the activities and failure to act of the comptroller and his conservator and after refusing to allow evidence of the solvency and lack of emergency at the Exeter Bank on February 26, 1962.

Petitioners appealed to the Third Circuit Court and by order filed September 18, 1964 (337 F. 2d 75), the cause was remanded with directions to reinstate the comptroller as a party defendant and to reinstate the complaint as to all other defendants, and to take further proceedings

consistent with the court's opinion. The Third Circuit Court decided that the comptroller's determination repecting the existence of an emergency at the Exeter Bank on February 26, 1962, was reviewable and remand was necessary for consideration of the question in the first instance by the District Court. The Circuit Court limited and restricted the remand for the purpose of determining "whether or not an emergency existed respecting the Exeter Bank within the purview of Section 181" subject to the condition that "the standard to be applied is not whether an emergency in fact existed, but whether a reasonable man on the basis of the facts of which he was aware or should have been aware, could reasonably conclude that an emergency existed." All other issues were either not decided or were decided against Petitioners.

This Honorable Court denied certiorari on March 29, 1965 (380 U.S. 952) (1965). Thereafter the District Court reinstated the comptroller and the complaint on July 14, 1965, held a hearing on January 9, 1967, decided that the comptroller could have reasonably concluded that an emergency existed at the Exeter Bank on February 26, 1962, and by order dated April 7, 1967, decreed that a verdict and judgment in the above case be entered in favor of the defendants.[1] Petitioners again appealed to the Third Circuit Court and by order dated May 9, 1968 (not reported), that court affirmed the lower court's decision.

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[1] When this action was commenced on March 6, 1962, Mr. James Saxon was the comptroller. He has left government service within the last two years and has been substituted on the record by William B. Camp, the present comptroller. Reference herein to Appellants' Original Appendix is abbreviated "Orig. App.", and reference to Appellants' Supplemental Appendix is abbreviated "Supp. App."

All other issues were again either decided against the petitioners, ignored or not decided, particularly question One presented herein. The Circuit Court stated "other issues raised by Appellants were either disposed of in original decision or did not require discussion".

On January 29, 1962, a defalcation was made known to the ten directors of the Exeter bank (Supp. App. p. 107a). The United States Comptroller knew that the shortage was caused by George Daileda, cashier, and August Lippi, chairman of the Board of Directors, and that warrants were issued against them on the same day for their respective parts in the defalcation (Supp. App. pp. 12a, 31a, 87a).[2] The Comptroller considered the defalcation unusual not only because of dollar volume but because of the fact the Chairman of the bank (who controlled the 6 majority directors) and possibly two other Lippis (his sons) who were on the board were involved in the shortage (Supp. App. 13a). At the time of the defalcation, there was a total of $1,200,000.00 in fidelity bonds in effect at the Exeter bank to cover defalcations, $200,000.00 primary coverage and $1,000,000.00 excess coverage (Orig. App. p. 62a; Supp. App. p. 53a; Policy No. 24043). The excess bond was originally purchased December 24, 1957, for $500,000.00 and was increased to $1,000,000.00 on December 15, 1959 (Supp. App. p. 53a; Ex. 23). It covered "all losses sustained by the assured at any time but discovered

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[2] Mr. Lippi was in Washington, D. C. on January 29, 1962 (Orig. App. p. 93a; Supp. App. p. 12a), and it was reported that he had a $30,000.00 Exeter bank Cashiers Check and a passport and itinerary for South America with him (Supp. App. p. 87a; Ex. 25). He was convicted for his part in the shortage (Supp. App. p. 30a), and is now in the Federal Prison at Lewisburg, Pa.

after December 24, 1959, . . .", without any terms, exclusions, conditions, or limitations affecting its validity at the Exeter bank (Supp. App. pp. 42a, 43a; Ex. 19). In addition to the above each savings account was insured for $10,000.00 by the Federal Deposit Insurance Corporation (Orig. App. pp. 86a, 61a). There were seventeen accounts in excess of $10,000.00 (Supp. App. pp. 59a-61a; Ex. 23). The excess totaled approximately $170,000.00 and this amount was therefore not protected by Federal Deposit Insurance (Supp. App. p. 110a). On December 31, 1961, the Exeter bank had capital of $75,000.00, surplus of $225,000.00, undivided profit of $51,187.37 (total capital of $351,187.37) (Supp. App. p. 45a; Ex. 20). On January 31, 1962, the undivided profit account was $54,-192.07 (Supp. App. p. 56a; Ex. 23). The bank building and furniture and fixtures were insured for $80,000.00 (Supp. App. p. 51a; Ex. 25), although listed on the books as $48,341.53 (Supp. App. p. 62a; Ex. 23).

On January 29, 1962, the defalcation was known to be $397,948.78 (Par. 7, Supp. App. pp. 87a, 94a), and on the same day the Exeter bank made demand on the excess bond carrier for payment of the excess over $200,000.00 (Par. 9, Supp. App. p. 88a; Ex. 25). Marshall Abrahamson, the Chief National Bank Examiner from Philadelphia with forty years experience (Supp. App. p. 31a) informed the Security Mutual Casualty Company (the excess bond carrier) on or before February 1, 1962, that the aggregate loss or shortage would be approximately $400,000.00 and that the claim against it would be approximately $200,000.-00 (Par. 10, Supp. App. p. 88a; Ex. 25). The shortage mounted rapidly (Supp. App. p. 32a) and was $404,000.00 within a day or two after January 29, 1962 (Supp. App. pp. 31a, 32a).

An independent audit commenced on January 30, 1962, and completed on April 24, 1962, revealed the final shortage to be $459,710.22 (Supp. App. p. 61a). The shortage accumulated over a period of 25 years (Supp. App. p. 32a). The discovery of the shortage had no effect on the day-by-day operations of the bank (Supp. App. pp. 32a, 33a). The circumstances that existed for a month after January 29, 1962, existed for at least several years prior to that date (Supp. App. p. 18a).

On February 2, 1962, the Security Mutual Casualty Company filed suit against August J. Lippi, George J. Daileda, The First National Bank of Exeter, and others in the district court for the Middle District of Pennsylvania, Civil Action 7534, seeking a preliminary injunction because immediate and irreparable injury and loss would result to it under its undertaking to the Exeter bank under the $1,000,000.00 Excess Fidelity Bond No. 24043. The injunction was granted on the same day at 12:30 p.m. by Judge Frederick C. Follmer, generally restraining all defendants from transferring, mortgaging, pledging, or otherwise disposing of any property owned by them or in which they had any interest (Supp. App. pp. 93a, 94a, 95a). The injunction was dissolved and the action discontinued without prejudice on February 26, 1962 (Supp. App. pp. 98a, 99a; Ex. 25). On November 7, 1962, after the sale, the Wyoming bank settled the claim of the Exeter bank against the excess bond carrier for $129,855.11, which was 50% of the total claim (Orig. App. p. 39a).

The Comptroller never considered the appointment of a receiver (Supp. App. p. 21a) but did by telegram dated February 19, 1962, at 6:30 p.m. appoint a former National Bank Examiner as a conservator for the Exeter bank (Orig.

App. pp. 109a, 110a, 120a, 121a) and he was bonded immediately (Supp. App. p. 19a). The known defalcation was in excess of $400,000.00 at this time (Supp. App. p. 11a).

The Comptroller's telegram of appointment stated . . .

> "Conservator under direction of comptroller solely responsible for conduct of affairs of bank." (Orig. App. p. 110a).

In a subsequent telegram the Comptroller instructed the conservator as follows,

> "As conservator you are regarded as agent or officer of the United States charged with full responsibility of conducting affairs of bank under the provisions of Bank Conservation Act subject to direction of comptroller. During your incumbency the old directors and officers of the bank are without authority to act for bank and while you should cooperate with them in working out plans of reorganization you are not subject to their direction, control, or supervision." (Orig. App. p. 120a).

The conservator was discharged seven days later by telegram from the Comptroller of Currency dated at Washington, D. C., on February 26, 1962, at 6:14 p.m. (Orig. App. pp. 111a, 112a). During this period, the instructions to the comptroller notwithstanding, the Lippi group, controlled by August Lippi, with plaintiffs not voting, sold the Exeter bank to the Wyoming bank (Orig. App. pp. 121a, 122a).

While the conservator was in charge (5 banking days) the bank continued to do business, and the sum of $43,669.65 was deposited in savings accounts and the sum of

$2,419.00 was deposited in Christmas Club accounts. Between February 1 and February 26, 1962 (18 bankings days) the savings accounts increased by $164,900.18, the Christmas Club accounts increased by $6,946.50, and the Vacation Clubs increased by $90.00. The commercial deposits on February 1, 1962, were $668,651.63 and reached a high of $744,713.06 by February 13, 1962 (an increase of $76,061.43 for 9 banking days). By February 26, 1962, they were at $640,289.24, or a net reduction from February 1, 1962, of $28,362.41. While the conservator was in charge, they were only reduced by $4,929.60. The special time deposit of $69,400.55 never changed (Supp. App. pp. 74a-84½a; Ex. 24, Daily Financial Sheets).

Deposits were accepted by the conservator during his conservatorship (Orig. App. p. 43a; Supp. App. p. 16a) and the bank continued to operate in the usual way subject to a limitation imposed by the comptroller that only ten per cent could be withdrawn from any account (Supp. App. pp. 37a, 38a).

Despite the fact that the Comptroller, even before the defalcation, was dissatisfied with the Lippi control and management (Supp. App. p. 30a)[3] and despite the fact that August Lippi, Chairman of the Board, was arrested on January 29, 1962, for his participation in the shortage (Supp. App. pp. 12a, 31a), and the Comptroller felt Lippi's two sons on the Board were involved in the shortage, the Comptroller allowed him to negotiate for the sale of the bank (Supp. App. pp. 12a, 15a). The Comptroller took no legal action to remove him or the controlling Lippi group from the Board of Directors (Supp. App.

[3] They controlled 1551 out of the 3000 shares (Supp. App. p. 13a) and constituted 6 out of 10 directors (Supp. App. p. 22a).

pp. 14a, 35a). Mr. Lippi and his son, Ettore Lippi, President of the Exeter bank, negotiated with Mr. Bossard and others from the Wyoming bank on February 25th (Sunday) for the sale of Exeter bank to Wyoming bank (Orig. App. pp. 90a, 121a, 122a; Supp. App. p. 15a). The Wyoming Bank had made an original offer on February 9, 1962, of $108,000.00 over book value (Orig. App. p. 106a) and on February 25th had increased that offer to $120,000.00 over book value plus 40% of any recovery on the excess bond (Orig. App. pp. 87a, 90a). On February 26, 1962, between 10:00 and 12:00 a.m., while the conservator was in charge, the Lippi group sold the assets of the bank by accepting the last offer of the Wyoming Bank (Orig. App. pp. 44a, 68a, 69a, 121a, 122a), subject to the approval of the comptroller. The comptroller approved the sale even though this was an attempt at a voluntary dissolution without the necessary two-thirds shareholder approval (Orig. App. p. 44a).

There were at least six banks in the community which showed an interest in buying the Exeter bank (Supp. App. p. 20a) and at least four in fact made offers to purchase the bank (Orig. App. pp. 55a, 105a-109a, 128a), all of which made the Comptroller very happy (Supp. App. p. 20a). On February 23, 1962, the First National Bank of Pittston offered the Exeter bank's shareholders $186,500.00 over and above book value for the purchase of all shares (Orig. App. p. 105a). This same offer was made on February 7, 1962, and was actually accepted by the Board of Directors of the Exeter bank on February 19, 1962 (Orig. App. pp. 50a, 67a, 68a; and 4th, 5th and 6th findings of fact Orig. App. pp. 125a, 126a), before the conservator was appointed. The conservator testified that he had no knowl-

edge of any offer at all to buy the Exeter bank (Orig. App. p. 40a).

The Exeter bank was never insolvent (Supp. App. pp. 11a, 14a, 15a, 21a, 31a, 33a) and never lost the confidence of the banking public, even when the conservator was in charge (Supp. App. pp. 16a, 17a, 34a). The Exeter bank had its annual examination by the Office of the Chief National Bank Examiner before January 29, 1962, and no complaint was made by the National Bank Examiner concerning any loans or any matters on its accounts. The Examiners indicated the affairs at the bank were in satisfactory condition (Supp. App. p. 11a). There was no emergency at the time of that examination nor for the previous twenty-five years (Supp. App. pp. 17a, 18a). Mr. Abrahamson never thought the Exeter bank might be a complete failure (Supp. App. p. 15a).

The Comptroller's Office had no guideline, definition, directive, rule, or department regulation as to what constitutes an emergency (Supp. App. pp. 21a, 22a). The conservatorship device had never been used in the country since the banking holiday of 1933 (Supp. App. 14a).

On April 10, 1962, Mr. Saxon filed a motion for Summary Judgment and an affidavit dated March 28, 1962, in the Middle District Court which included the following statement (Docket Entry April 10, 1962; Orig. App. pp. 4a, 31a):

> "(1) On January 29, 1962, there was discovered a shortage in excess of $300,000.00 in the First National Bank of Exeter, Pennsylvania. As an audit of the bank progressed, the shortage grew until by February 19, 1962, it had reached $448,000.00 . . ."

* * * * * * * *

"(2) During the period from January 29, 1962, until February 19, 1962, I urged that there be a reorganization or sale of the bank . . ."

• • • • • • • • •

"(4) During the period when the bank was in conservatorship, I continued to urge a reorganization or sale of the bank's assets. By February 26, 1962, I had concluded that the bank was insolvent and that unless immediate steps were taken to reorganize or sell the bank, the Federal Deposit Insurance Corporation should be appointed receiver for the purpose of liquidating the bank, and pay the depositors and other creditors . . ."

On April 11, 1962, fifteen days after the date of the affidavit, and one day after filing the motion for summary judgment, Mr. Saxon wrote a three page letter to the Honorable Brent Spence, Chairman of the Committee on Banking and Currency of the House of Representatives of the United States (Supp. App. pp. 36a-40a), explaining the Exeter bank situation wherein he said:

"A receiver may be appointed by the comptroller only if he is satisfied that the bank is insolvent, etc., there was no alternative but to seek some satisfactory means of conserving the assets of the bank until the full amount of defalcation could be ascertained, the liability or lack of liability, of the bonding company could be better established and there could be determined whether a prompt sale or reorganization of the bank could be accomplished. There was reason to believe that the bank could be sold. In spite of its difficulties the bank at no time lost the confidence

of the banking public in Exeter and there was no run or heavy withdrawal of deposits. A number of sound and well managed banks in the area had expressed an interest in acquiring the bank."

Mr. Saxon further stated in his letter that he appointed Mr. Russell E. Gardner, Vice-President of the Miners National Bank of Wilkes-Barre and a former National Bank Examiner, as the conservator and

> "During the seven days of the conservatorship, the bank continued to have the confidence of the public, and although withdrawal of funds was limited to 10%, there was no rush on the part of the depositors to withdraw the amount permitted, but the bank continued to operate in the usual way subject to the limitation."

Further in his letter Mr. Saxon stated that on two previous occasions he placed banks in receiverships but

> "in the Exeter case I could not reasonably have done so at the time the bank was placed in conservatorship."

He also said:

> "There was doubt as to whether it could be held to be technically insolvent."

The one director, Carlo Santarelli, who withdrew $160,000.00 was not a member of the Lippi group and was not a member of the minority group (Supp. App. p. 22a). His withdrawal was before the defalcation and the appointment of the conservator (Supp. App. pp. 22a, 23a, 33a) and according to Mr. Abrahamson, was for the purpose of purchasing heavy machinery for his concrete mix-

ing business (Supp. App. p. 23a). The withdrawal did not affect the capital of the bank (Supp. App. p. 33a). The Santarelli check was drawn before the defalcation became known and was honored one day thereafter (Supp. App. 23a).

Before giving his approval to the sale of the assets of the bank, the comptroller did not submit the issue of voluntary dissolution to the shareholders (Orig. App. p. 64a; Supp. App. p. 15a) and consequently approval by a two-thirds vote of the shareholders was never obtained. Two months later, on April 26, 1962, after this action was commenced, the issue of voluntary dissolution was presented to the shareholders and disapproved by a failure to obtain the necessary two-thirds vote (Orig. App. p. 74a). The conservator did not negotiate for the sale, did not petition the court for approval of the sale, and did not advertise for the return of the bank to its Board of Directors (Supp. App. 16a; Orig. App. pp. 42a, 43a).

Mr. Abrahamson testified in depositions that the emergency was from January 29, 1962, to February 19, 1962 (Supp. App. pp. 17a, 19a), and that it was definitely determined that there was an emergency on Friday, February 16, 1962, three days before the appointment of the conservator, and the emergency was terminated when he was appointed (Supp. App. pp. 17a, 19a). Nevertheless, the comptroller approved the sale on the late afternoon of February 26, 1962 (Orig. App. p. 44a), and, on the basis that an emergency existed on that date, contrary to Mr. Abrahamson's sworn testimony, waived the statutory requirement of two-thirds shareholder approval of voluntary dissolution after, but not before, the sale was made by the Lippi group.

The following additional relevant events occurred on and after February 26, 1962: Attorney Dalessandro, on February 26, 1962, informed the Directors of Wyoming bank and Mr. Abrahamson that he would go to court over the sale and as a result two paragraphs in the agreement of sale were changed (Supp. App. pp. 23a, 24a). On February 27, 1962, Attorney Dalessandro phoned Mr. Saxon informing him of the fact that on February 19, 1962, the offer of the First National Bank of Pittston was accepted, urging him to correct the illegal activity of the Lippi group, and to correct his abuse of discretion in approving the illegal sale to the Wyoming bank (Orig. App. p. 14a).[4] This lawsuit was commenced March 6, 1962; the Board of Directors of the Exeter bank met on March 26, 1962, and the Lippi group (6 Directors) voted to ratify the alleged invalid contract of February 26, 1962 (Orig. App. p. 95a; Item 16, pp. 127a, 128a); the shareholders of the Exeter bank turned down a proposal for voluntary dissolution by a vote of 1628 for and 1215 against (Orig. App. p. 74a; Item 22, pp. 128a, 129a). On August 28, 1962, plaintiffs applied to the Circuit Court for a supersedeas pending the first appeal of August 15, 1962 (Docket Entry, Orig. App. p. 5a). The second appeal to the Third Circuit Court was filed July 22, 1963 (Docket Entry, Orig. App. p. 6a). The third appeal to that court was filed May 5, 1967 (Docket Entry, Supp. App. p. 7a).

The First National Bank of Exeter is still a legally chartered banking association. Its charter has not been cancelled, revoked, suspended, withdrawn or otherwise

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[4] Paragraph thirty-one of the plaintiff's Complaint (Orig. App. p. 14a). The comptroller has not filed an Answer in this case.

terminated. Although the record is not clear on the subject, petitioners feel certain that all counsel of record will agree that all stock owned or controlled by the majority Lippi directors (at least 1551 shares out of 3000 shares authorized, issued and outstanding) has been purchased and is held by a committee of three persons for the Wyoming National Bank pending the outcome of this case. The source of the funds required for the purchase is believed to be the Wyoming National Bank.

VI.

REASONS FOR GRANTING THE WRIT

The grounds on which the jurisdiction of the Supreme Court of the United States is invoked and the reasons relied on for allowance of the Writ are as follows:

(A) The great national public importance of the question as to whether a board of directors can sell a national bank when a conservator is in charge of the affairs of said bank.

(B) The Court of Appeals for the Third Circuit has rendered a decision in conflict with the deceisions of the United States Supreme Court, its own Court, and other Circuit Courts on matters similar to the case at hand.

(C) The case involves the interpretation of the National Banking Laws and the Banking Conservation Act (12 U.S.C. 181, 192, 203, 205, 208) and the administration of said laws.

(D) The important national question of whether the Comptroller of Currency of the United States of America can waive the National Banking Law requirement that a solvent national bank can only go into voluntary liquidation by approval of the shareholders owning two-thirds of the outstanding stock.

(E) The great national public importance of the question of the duties, responsibilities and liabilities

of conservators of national banks and the Comptroller of Currency of the United States.

(F) The Court of Appeals has decided an important national question of Federal law which has not been but should be settled by this Court pertaining to what is an emergency under the Bank Conservation Act.

(G) The great national public importance of whether the minority shareholders in a class action can be estopped from denying the validity of a contract of sale of a national bank which was in conservatorship at the time of the contract and the sale.

VII.

ARGUMENT IN SUPPORT OF REASONS FOR GRANTING THE WRIT

(A)

The Board of Directors of a national bank cannot sell all assets of the bank when a conservator is in exclusive charge.

On this issue the Circuit Court erroneously stated "We think the events which took place subsequent to February 26, 1962, served to render moot any questions concerning the possible incapacity or disability of the Exeter directors and officers to enter into the instant contract while the conservator was still in operation". The Circuit Court used as a reason for the foregoing statement the following language ". . . the Exeter directors manifested their acceptance of the Wyoming offer or that in view of the reliance demonstrated by the Wyoming bank with respect to the agreement, the Exeter bank is estopped from denying the contract's validity on the technical ground urged here." Then to further compound its error the Circuit Court added "Moreover, on March 26, 1962, as we have said, the contract was formally approved by the Exeter directors by a vote of six to three."

It is respectfully submitted to this Honorable Court that the above quoted language of the Third Circuit Court is entirely lacking of a reasonable, sensible or legal foundation. The Circuit Court appears to be saying that although the majority directors had no authority to

act on February 26, 1962, and therefore, could not enter a legal contract, they thereafter on March 26, 1962, approved their own illegal act of February 26, 1962, and the subsequent approval turned the illegal act into a legal act. The issue of estoppel will be covered subsequently in this petition.

The appointment of a conservator under 12 U.S.C. 203, gives complete and exclusive possession and control of the bank affairs and assets to the conservator who has the same rights, duties and responsibilities as a receiver of an insolvent national bank. While the conservator is in charge there is one, and only one, way to sell a national bank and that is by the conservator, and he can only do so by first petitioning the District Court for approval and obtaining said approval. 12 U.S.C. 203, 192. Voluntary liquidation is a legal impossibility because 12 U.S.C. 203 provides, ". . . During the time such conservator remains in possession of such bank, the rights of all parties with respect thereto shall, subject to other provisions of this Act, be the same as if a receiver had been appointed therefor".

The conservator for the Exeter Bank was appointed February 19, 1962 at 6:30 p.m. (Orig. App. pp. 109a, 110a). A conservator is the administrator of a trust: *Wittnebel v. Loughman,* 9 F. Supp. 465, aff. 80 F. 2d 222, 224 (1935 C.C.A. 2d), cert. denied, 56 S. Ct. 590, and he represents stockholders as well as creditors. *Michelson v. Penney,* 135 F. 2d 409, 416 (2nd Cir. 1943).

As conservator, he took control of the bank and accepted deposits (Orig. App. p. 43a). During his conservatorship "the bank continued to have the confidence of the public . . . there was no rush on the part of the

depositors to withdraw the amount permitted, but the bank continued to operate in the usual way subject to the limitation." (Comptrollers' letter to Chairman of House Banking Committee dated April 11, 1962 (Supp. App. pp. 36a-40a.)) While a conservator is in charge of the bank, the officers and directors have no authority whatsoever to act since a conservator has the same powers as a receiver of an insolvent bank. *Wilson vs. Awalt* (1933), 2 F. Supp. 465, 468; *General Electric Realty Corp. vs. First National Bank of Detroit* (1938), 23 F. Supp. 664, 666. The assets of the bank passed to the exclusive control of the conservator. *Anderson v. Cronkleton,* C.C.A. Neb. (8th Cir. 1929), 32 F. 2d 170, 171; *Earle vs. Pennsylvania,* 178 U.S. 449. Even the Comptroller's telegram appointing the conservator stated, ". . . during your encumbency the old directors and officers of the bank are without authority to act" (Ex. 14, Orig. App. pp. 120a, 121a).

Notwithstanding that they had no power or authority to act, the majority directors of the Exeter Bank on February 26, 1962, between 10:00 a.m. and noon, attempted to accept an offer of Wyoming National Bank to purchase all the assets and assume the liabilities (Orig. App. p. 44a). The conservator was not discharged until 6:14 p.m. that same evening (Orig. App. pp. 111a, 112a). The contract of sale was signed before the conservator was discharged (Orig. App. pp. 44a, 127a). The conservator did not negotiate nor sign the contract of sale and did nothing in regard to the sale nor did he petition any court for approval thereof (Orig. App. p. 42a). Notwithstanding that he accepted deposits, he did not advertise the return of the bank to the board of directors, as required by law (Orig. App. pp. 43a, 44a), 12 U.S.C. 208. The return of

the bank to the board of directors was for the restricted purpose of "executing a sale of all the assets of the bank to the Wyoming National Bank of Wilkes-Barre" (Ex. 10, Orig. App. pp. 111a, 112a). Even this was illegal because the termination of a conservatorship with the return of the bank to the board of directors can only be for the single and restricted purpose of permitting the bank "to resume the transaction of its business" (12 U.S.C. 205), and the sale of all assets of a bank under these circumstances is not resuming the transaction of its chartered business purpose as bank business is defined in 12 U.S.C. 24, Section Seventh; 12 U.S.C. 21. *Kimen v. Atlas Exchange National Bank of Chicago,* 92 F. 2d 615, 617 (CCA 7th, 1937), cert. denied 58 S. Ct. 746; 9 *C.J.S.,* Sec. 654, p. 1208; *Evans v. VanDyke,* 97 F. 2d 18, 19 (CCA 3rd, 1938).

Thus, when the majority directors attempted to sell the assets, they had no power to act because of the existence of the conservator who in fact did not participate in the sale, although he was the only one who could sell the assets and he could do so only by obtaining court approval. The objection to the contract is not only that the corporation ought not to have made it, but also that it could not make it and it is therefore wholly void. *Dillon, Read & Co. v. Commercial State Bank* (3rd Cir., 1932), 62 F. 2d 606, 608; *Central Transportation Co. v. Pullman Palace Car Co.,* 139 U.S. 24, 11 S. Ct. 474, 488.

It is clear in 12 U.S.C. 192 and 203 that an order of a court of competent jurisdiction is a condition precedent to the sale of assets when a conservator is in charge. Without such approval there is no binding contract. *Reibman vs. F.D.I.C.,* 66 F. Supp. 409, 410, aff. (3rd Cir., 1946)

156 F. 2d 371; *Earle vs. Pennsylvania,* 178 U.S. 449, 20 S. Ct. 915 (1900); *Mitchell v. Joseph* (1941, CCA 7th), 117 F. 2d 253, 254, 255; *Roth v. Hood* (CCA 3rd, 1939), 106 F. 2d 616, 618; *Baker v. Schofield* (9th Cir.), 221 F. 332, 328; *Davis Trust Co. v. Hardee* (CCA, D.C., 1936) 85 F. 2d 571, 573; *Ex Parte Moore,* 6 F. 2d 905, 910 (1925); *Matter of the Receivership of the Home National Bank of Ellenville, N. Y.,* 147 F. Supp. 389, 391; *Armstrong v. Woolley* (CCA 5th, 1937), 89 F. 2d 295, 296. In *Reibman v. F.D.I.C.,* the Court stated at p. 410,

> "Moreover, under 12 U.S.C. 192 . . . it is requisite that any sale to be a valid one must be approved by the Comptroller and subsequently by the Court and until such is the fact, it does not become a binding contract."

The purpose of requiring court approval is to provide a check upon the broad powers given to the Comptroller and his agents. *Griggs vs. Baumer* (3rd Cir., 1942), 130 F. 2d 899, 901; *Hulse vs. Argetsinger* (2nd Cir., 1927), 18 F. 2d 944, 945. Until the order is first obtained the sale is in no sense legal, there is no binding contract, and the bidder merely occupies the position of a continuing offeror. *Griggs vs. Baumer,* supra, 902; *Reibman vs. F.D.I.C.,* supra, 409, 410. A sale of assets which has the effect of relieving the conservator of his statutory duties is invalid, *Ex Parte Moore,* 6 F. 2d 905, 910 (1925). No rights can be obtained under a void contract. *Marion v. Sneeder,* 291 U.S. 262, 54 S. Ct. 421; *Roth v. Hood,* supra, p. 618.

(B)

The Court of Appeals for the Third Circuit has rendered a decision in conflict with a decision of the United States Supreme Court, other circuit courts, and its own court on an issue in the case at hand, the issue being that a board of directors of a national bank cannot sell all the assets of the bank when a conservator is in exclusive charge and control of the bank. Those decisions which are contrary to the present Third Circuit Court decision in this case and which hold that the directors cannot sell the bank when a conservator is in charge are as follows:

Earle v. Pennsylvania, 178 U.S. 449, 20 S. Ct. 915 (1900);

Davis Trust Co. v. Hardee (CCA D.C., 1936), 85 F. 2d 571, 573;

Hulse vs. Argetsinger (CCA 2d, 1927), 18 F. 2d 944, 945;

Roth v. Hood (CCA 3rd, 1939), 106 F. 2d 616, 618;

Reibman vs. F.D.I.C., 66 F. Supp. 409, 410, aff. (CCA 3rd, 1946), 156 F. 2d 371;

Evans v. VanDyke (CCA 3rd, 1938), 97 F. 2d 18, 19;

Griggs vs. Baumer (CCA 3rd, 1942), 130 F. 2d 899, 901;

Armstrong v. Woolley (CCA 5th, 1937), 89 F. 2d 295, 296;

Mitchell v. Joseph (CCA 7th, 1941), 117 F. 2d 253, 254, 255;

Anderson v. Cronkleton (CCA 8th, 1929), 32 F. 2d 170, 171;

Baker v. Schofield (CCA 9th), 221 F. 322, 328.

(C)-(D)-(E)

The national banking laws (R.S. 5220, 12 U.S.C. 181, 192) and the Bank Conservation Act provisions (48 Stat. 2, 3, 4; 12 U.S.C. 203, 205, 208) which are set forth at pp. 120-125 require the interpretation of this Honorable Court because of the fact that said laws resulted from the national depression and the banking holiday of 1933, were enacted shortly thereafter, and there was no Federal Deposit Insurance Corporation nor any Federal Deposit Insurance until said laws were passed. It is essential to the banking business of the country that the above statutes be given a present-day interpretation in accordance with circumstances now existing relative to banking. In particular it is respectfully submitted that this Honorable Court should give an interpretation to the term "emergency" as used in 12 U.S.C.A. 181, since the Circuit Court's interpretation of that term, in effect, writes it out of the statute.

Under the Circuit Court decision pertaining to an emergency, the Comptroller can *merely declare* an emergency in any national bank in the country, with or without appointing a conservator or receiver, and force the sale of the bank without any protection or safeguards for the shareholders. It is no defense to this argument to say that the Comptroller of Currency of the United States is a man of great intelligence and high standards. The history of Mr. Saxon's conduct in office when he was comptroller is a matter of common knowledge in the banking business and is indicative of what an uncontrolled comptroller can do.

It is also extremely essential to the banking industry of the country to make a current determination that the

Comptroller of Currency of the United States cannot waive the statutory requirement that a solvent national bank can only go into voluntary liquidation by approval of the shareholders on 2/3 of the outstanding stock. Further, the duties, responsibilities, and liabilities of the comptroller and the conservator require review, definition and direction from this Honorable Court for the safe and orderly conduct of the banking business without fear or silent threat from the powerful office of the Comptroller of Currency and because of the Circuit Court's decision which in effect gives unlimited, unrestricted, uncontrolled and non-reviewable power and authority to the Comptroller. The Circuit Court's decision makes National Banking a one man business.

Under the Circuit Court decision the statutory requirement of 2/3 shareholders approval before voluntary liquidation is useless and has no force or effect, especially since the comptroller in an affidavit dated March 28, 1962, filed April 10, 1962, in the District Court stated that the bank was insolvent and on April 11, 1962, the day after filing the affidavit, stated in a letter to the Honorable Brent Spence, Chairman of the House Committee on Banking and Currency, that the bank was not insolvent, never lost the confidence of the banking public and there was no run or heavy withdrawal of deposits. The effect of the Circuit Court's decision is to allow at least a double standard for the comptroller—one when he speaks to the court and another when he speaks to a congressman—and then give it the court's stamp of approval thereby condoning such opposite and incredible statements and in the process causing great financial loss to the shareholders. It is unbelievable that the Circuit Court approved the acts and conduct of the comptroller who in turn encouraged, aided, and assisted the conduct

of August Lippi, one of the two persons responsible for the entire problem and trouble at the Exeter bank and for this lawsuit. The Circuit Court's decisions, which in effect approved the activity of August Lippi, can only engender in bank employees and the banking public disrespect for law and encouragement to commit crimes because obviously if the Circuit Court's decisions are allowed to stand they are proof positive that crime does pay. The simple chronology of events to prove this is:

Before Jan. 29, 1962:

(1) August Lippi stole part of the money thereby causing a defalcation;

Between Jan. 29, 1962, and Feb. 26, 1962:

(2) August Lippi and the group he controlled refused to divest themselves of ownership of stock and of control of the Exeter Bank;

(3) August Lippi thereby forced the appointment of a Conservator on Feb. 19, 1962;

(4) The Comptroller allowed August Lippi to continue to control and operate the bank after the Conservator was appointed up to and including Feb. 26, 1962;

(5) August Lippi and his son were the only ones who negotiated for the sale of the bank and August Lippi sold the bank;

(6) The Comptroller approved all of August Lippi's acts;

Subsequent to Feb. 26, 1962:

(7) The District Court gave its approval to the conduct and acts of the Comptroller thereby automatically approving the conduct and acts of August Lippi;

(8) The Circuit Court gave its approval to the conduct and acts of the Comptroller and thereby gave

its approval to the conduct and acts of August Lippi even at a time when August Lippi was in Federal Prison in Lewisburg serving a sentence for embezzling the money from the Exeter Bank which caused this lawsuit to be filed.

Any bank stockholder, director, officer or employee who is aware of the lower court's decisions in this case is aware that the entire banking industry in the country is at the mercy of one man—the Comptroller of Currency—and that under their decisions there is no protection which the law provides or affords to them.

It is respectfully submitted to this Honorable Court that it should accept this case, reverse the Third Circuit Court's decisions, declare the conduct of the comptroller improper, declare the sale of the Exeter Bank void, illegal, invalid, and of no effect and give a solid interpretation to the laws involved in this case thereby restoring banking to a sound foundation and restoring confidence of the general public in the banking business, and promoting obedience to law.

The minority shareholders should not be penalized for the fact that this case is almost seven years old. Petitioners have done everything possible to terminate the case at the earliest date but have been prevented from doing so because of the history of the case, multitude of hearings at the District Court, three appeals to the Circuit Court, and one previous petition for certiorari to this Honorable Court. The independent audit of the Exeter Bank, which began on *Jan. 30, 1962* and ended on *Apr. 24, 1962*, establishes and verifies all assets and liabilities and therefore a reversal of the lower court's decisions and declaring the sale illegal presents no accounting problem whatsoever. Further, the minority shareholders will receive for their stock only approximately one-third of proper value if the sale is allowed to stand.

(F)

What is an emergency under the Bank Conservation Act (12 U.S.C. 181) and could a reasonable man on the basis of facts of which he was aware or should have been aware have reasonably concluded that an emergency existed on February 26, 1962, between 10:00 and 12:00 noon at the First National Bank of Exeter?

Although petitioners believe that the Circuit Court should be reversed on the theory set forth in section (a) above to the effect that the board of directors had no authority to sell the bank and therefore the sale is void, illegal and no effect, petitioners will discuss the question of emergency because of the decisions of both lower courts.

Considering that the conservatorship device was never used since the banking holiday of 1933, and the Comptroller had no guidelines, definitions, directives, rules, or department regulations as to what constitutes an emergency under 12 U.S.C.A. 181, the matter before the court appears to be one of first impression.

Mr. Abrahamson said: "The emergency as we are using it here, means that something could happen to the bank that would cause it to become insolvent and force it closing." (N.T. 51, Jan. 9, 1967 Hearing).

Even if we accept the definitions and apply it to the case at hand, if there were an emergency, it occurred and ended at the latest on February 19, 1962, when the Comptroller took "immediate action" in appointing a Conservator. His appointment should have terminated the so-called "emergency" prior to February 26, 1962, the date of the sale of the bank. With the appointment of the

Conservator, the Comptroller was in full charge and the circumstances which he said caused him concern were eliminated and so was the emergency.

The Comptroller had four of his examiners and an independent audit team present, and it would not take ten days to verify accounts with each and every depositor by mail, this being a small community bank (Supp. App. p. 107a). All loans were or could have been verified without conjecture. Letters of verification on loans and savings accounts were mailed by the auditor shortly after February 1, 1962 (Supp. App. pp. 49a, 52a).

The concern over Mr. Santarelli withdrawing more money was thus ended; the liability or lack of liability on the excess bond could be determined without any need for hasty action; there was no run on the bank and no lack of public confidence in the bank; and the problem with Lippi and his group was terminated. Furthermore, all of the facts which the Comptroller relied upon to justify his declaration of an emergency on February 26, 1962, were by that time eliminated by the appointment of a Conservator on February 19, 1962.

A full consideration of all of the material facts would lead to only one conclusion and that is a reasonable Comptroller would not have concluded that an emergency existed at the First National Bank of Exeter on February 26, 1962.

On January 29, 1962, the shortage was disclosed by voluntary confession of George Daileda, the cashier (N.T. 13).[5] Judging from the fact that the defalcation occurred

[5] N.T. reference herein will be to Notes of Testimony of January 9, 1967, unless otherwise indicated.

over a period of *twenty-five years* and that the Comptroller's examination of the Exeter Bank in accordance with the national bank law (12 U.S.C.A. 481) during that period and just prior to January 29, 1962, did not disclose any shortage, it appears that the defalcation would never have come to light, except upon the death of Mr. Daileda. It did not affect the operation of the bank.

Before the last hearing on January 9, 1967, held by Judge Follmer, the plaintiffs subpoenaed Mr. Saxon to have him personally testify by way of depositions. The lower court would not allow this (Supp. App. p. 4a, March 22, 1967 Order) but in effect stated that the depositions of Marshall Abrahamson, Chief National Bank Examiner from Philadelphia, would be tantamount to taking Mr. Saxon's depositions, because Mr. Abrahamson was on the scene, gathered all the facts, and submitted them to Mr. Saxon. The lower court found that Mr. Abrahamson was in constant communication with Mr. Saxon from January 30, 1962, until the conservatorship was terminated (N.T. 32, 33) and Mr. Abrahamson "is the Comptroller" (N.T. 31). This being so, it is not disputed that the Comptroller and Mr. Abrahamson are one and the same person for the purpose of this lawsuit and that Mr. Abrahamson's knowledge of facts and his depositions are attributable to Mr. Saxon.

The Comptroller knew immediately on January 29, 1962, that:

(1) *the defalcation was on savings accounts only;*

(2) *it was then $397,948.78;*

(3) warrants of arrest were issued on that day for George Daileda and August Lippi, who was the Chairman of the Board of Directors of the Exeter bank;[6]

(4) on and prior to January 29, 1962, August Lippi and his group controlled the bank by six out of ten directors;

(5) he was dissatisfied with the Lippi management prior to the defalcation;

(6) every savings account was insured by the Federal Deposit Insurance Corporation up to $10,000.00 each;

(7) there was $1,200,000 Fidelity bond insurance.

Mr. Daileda confessed the defalcation on savings accounts and the warrants against him and Mr. Lippi charging violation of banking laws specified $397,948.78. This figure came from only one source and that was the Federal authorities because the charge was made by them. It was admitted that Mr. Lippi was in Washington, D. C. on January 29, 1962, and it was reported that he had a $30,000.00 Exeter bank cashier's check and a passport and itinerary with him for South America. Added to this was the fact that the Comptroller believed that two of Mr. Lippi's sons who were on the Board were also involved in the shortage. Further, the Comptroller repeatedly asked the Lippi group to divest themselves of their stock and control of the bank so that there could be a reorganization without them, or else the bank should be sold (Saxon

[6] Mr. Lippi was subsequently convicted and is now in Federal Prison. Mr. Daileda is dead.

Affidavit Docket Entry April 10, 1962, Orig App. 4a, 31a; Saxon Letter Supp. App. 36a-40a; Abrahamson Statement Supp. App. 12a, 13a, 14a; N.T. 51). The Comptroller did not take any legal action as prescribed in the Banking Code for removal of the Lippi group directors. Under these circumstances, a reasonable man would not have concluded an emergency existed but would have concluded that the emergency, if there ever was one, ceased on February 19, 1962, when the Conservator supplanted the Lippi group and became charged with the exclusive control and management of the Exeter bank.

The absolute unqualified answer to the issue is contained in the following questions and answers which were brought forth in Depositions from Marshall Abrahamson, the Chief National Bank Examiner, taken on June 7, 1966, as contained in pages 17a and 19a of Appellants' Supplemental Appendix:

> "(30) Q. This emergency that you thought existed, how long was it present at the First National Bank of Exeter?
>
> A. From the time we learned of the defalcation of Daileda.
>
> (31) Q. Until when?
>
> A. *Until the bank was placed in the conservatorship.* The emergency was developing as the shortage was developing. You see, with a $200,000.00 shortage and a $200,000.00 bond, there is no emergency because they are going to be repaid, but the minute it gets over that it depletes the capital, then you get into an emergency situation when you reduce the capital funds to a narrow proportion for the protection of the de-

positors. They were depleted as I remember it, under a $100,000.00. (Emphasis added).

Q. Pertaining to the emergency that you and Mr. Saxon thought existed at the Exeter bank, when would you say that it came into existence?

A. *Between January the 29th, when the shortage was disclosed, and February the 19th when the Conservator was appointed because the shortage was developing daily in that period.* (Emphasis added).

Q. Could you state any specific time that you and Mr. Saxon concluded that as of now, as of the specific time, that there was an emergency in the First National Bank of Exeter?

A. I think it was definitely determined on the Friday prior to February 19th because he sent me back to Exeter with those instructions so he was satisfied that (33) based on the knowledge of the shortage at that time that an emergency did exist, because he gave us those instructions which I passed on to the Board of Directors.

Q. That would be Friday, the 16th, then?

A. Yes, the 16th."

Clearly the emergency, if one ever existed, ended on February 19, 1962, when the Conservator was appointed to cure the emergency and give adequate time to remedy the situation. With the Conservator in charge, there was no emergency on February 26, 1962, as the court below erroneously concluded.

It was repeatedly stated from the beginning of this case that the Exeter bank was never insolvent[7] and that

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[7] If the bank were insolvent 12 U.S.C.A. 181 would not be in issue in this suit.

it never lost the confidence of the banking public even with the Conservator in charge. By Mr. Abrahamson's own admission the Comptroller never even thought that the Exeter bank might be a complete financial failure and he never considered the appointment of a receiver. Mr. Abrahamson himself was asked in deposition:

> *"Did you ever report to Mr. Saxon that the Exeter bank might be a complete failure financially?*
>
> *On the contrary, I always advised the Comptroller that the bank was not insolvent"* (Supp. App. 15a and 21a) (Emphasis added).

Mr. Saxon knew that the same circumstances that existed for a month after January 29, 1962, at the Exeter bank existed for at least several years prior to that date, and that there was no declared emergency prior to January 29, 1962. *The Comptroller admitted that the discovery of the shortage had no effect on the day-by-day operations of the bank* (Supp. App. 32a, 33a). He also knew that the affairs of the bank were in satisfactory condition at the time of the last examination by his office before January 29, 1962 (Supp. App. 11a), and that his office did not make any complaints concerning any loans or matters on the accounts of the Exeter bank at the time of that examination. Mr. Abrahamson stated in his deposition (Supp. App. 18a):

> ". . . fundamentally the purpose of an examination is to determine the solvency of the bank and to see that Federal Banking Laws are complied with and that the assets are in sound condition."

Obviously, the Comptroller's last examination found the assets of the Exeter bank to be in sound condition. With

all of those facts at hand a reasonable man would have concluded the Exeter bank was in prosperity, not emergency.

By telegram from Washington, D. C., dated February 19, 1962, at 6:14 p.m., the Comptroller appointed Mr. Russell Gardner, a former national bank examiner, as the Conservator of the Exeter bank, thereby assuring himself that he had one of the most competent persons in charge. The Conservator was appointed:

> "... to take this thing over until the Board took some action to replenish the capital funds of the bank *or* until such action that we knew this million dollar excess bond would be covered *or* until the Lippi group would divest themselves because the management was highly questionable." (Abrahamson Testimony, N.T. 51) (Emphasis added).

As was proper procedure, he was immediately bonded and was supposed to take over full control of the bank.

The Comptroller informed the Conservator that he was

> "... regarded as agent or officer of the United States charged with full responsibility of conducting the affairs of the bank under the provisions of the Bank Conservation Act, subject to the direction of the Comptroller"

and further,

> *"during your encumbency the old directors and officers of the bank are without authority to act for the bank and while you should cooperate with them*

in working out plans of reorganization you are not subject to their direction, control and supervision." (Emphasis added).

The original telegraph of appointment stated "Conservator under direction of Comptroller solely responsible for conduct of bank's affairs."

With this exclusive control held by the Comptroller, it appears impossible for a reasonable man to decide that an emergency existed on February 26, 1962. Despite the fact that a Conservator is the representative of all shareholders, *Michelson vs. Penny,* C.C.A. N.Y., 135 F. 2d 409, he did nothing to represent or protect the minority shareholders. If there were an emergency why would Mr. Saxon let Mr. Lippi do all the negotiating for the sale of the bank and sell it, instead of the Conservator?

All problems that existed were eliminated by the appointment of the Conservator. Mr. Saxon's conduct indicates to a reasonable man that things were good because he allowed Mr. Lippi to take over the Conservator and do everything he, and only he, could have and should have done. The Comptroller not only let Lippi take over the Conservator's job, but he even gave it this stamp of approval when he let Lippi sell the bank and subsequently approved the sale. A reasonable Comptroller would not have concluded there was an emergency when Mr. Saxon:

(a) Was dissatisfied with the Lippi Management before the defalcation and did nothing about it;

(b) Let the Lippi Management continue to control and operate the bank from January 29th, the date of defalcation, to February 19th, 1962, the date of the appointment of the Conservator;

(c) Let the Lippi Management take over the duties of the Conservator from February 19th to February 26th, 1962, in negotiating for the sale. (The Conservator admitted he didn't even know of any offer to buy the Exeter bank);

(d) Let the Lippi Management sell the bank while the Conservator was in charge;

(e) Approved Lippi's acts, all of which came after August Lippi and George Daileda were charged with a defalcation of $397,948.78.

The Conservator was in charge for seven days which included only five banking days, and during his term of office:

(a) Deposits were accepted and the bank continued to do business and operate in the usual way, despite the 10% limitation on withdrawals;

(b) The sum of $43,669.65 was deposited in savings accounts;

(c) The sum of $2,419.00 was deposited in Christmas Club Accounts, an increase of a little more than 10%;

(d) The Vacation Club Account increased $46.00 from $516.00 to $562.00, an increase of approximately 9%;

From February 1st to the 26th (18 banking days):

(a) The Savings Accounts increased $164,900.18, a little less than 9% over the February 1st figure;

(b) The Christmas Club accounts increased by $6,946.50, a little more than 30%;

(c) Vacation Club accounts increased by $90.00 from $472.00 to $562.00, almost 20%;

(d) Commercial deposits reduced by only $28,362.41. From February 1st to the 13th (9 banking days) commercial deposits increased by $76,061.43. The lower court said

"it must be remembered in addition to the facts which the Comptroller knew, he had to assess the possibilities that could occur before exercising his judgment" (Supp. App. p. 110a, Footnote).

What would a reasonable Comptroller assess the possibilties to be?

(a) If Savings Accounts were increased by 9% in one month when the bank was supposedly in an emergency, a reasonable man would conclude that at the 9 percent per month rate, the Savings Accounts would be more than double and would be almost $4,000,000.00 by February 1st, 1963, a year later.

(b) The Christmas Club Accounts increased by 30 percent in February and after twelve months would be 360 percent over the February 1st amount of $21,391.75, or almost $80,000.00.

(c) The Vacation Club Account, on the basis of a 9 percent increase for five banking days while the Conservator was there, would be increased by 468 percent over twelve months.

On the basis of these figures a reasonable man would conclude that the Exeter bank was not in an emergency and that "the possibilities that could occur" would be that

business was exceptionally good and the bank was growing rapidly.

The loans the Comptroller said were doubtful, substandard, and uncollectible and which he thus disregarded as assets were in fact not as described by the Comptroller. The financial structure of the bank could not be questioned because the figures are most explicit in themselves. The Comptroller used as one of the reasons for designating an emergency the fact that he discounted or eliminated some loans from the balance sheet in arriving at the net capital structure of the bank. He never specified which ones but just stated "a certain number of them were losses, a certain number were doubtful, and some were substandard" (N.T. 28). If this be so, the Comptroller can go into any national bank and *merely say* there are doubtful loans, substandard loans and losses, without specifying any, declare the capital is impaired, appoint a conservator, and force the sale of any bank.

Impairment of capital of a national bank is stated in 12 U.S.C.A. 51B-1 as follows:

> ". . . the capital of such bank may be deemed to be unimpaired if the ~ound value of its assets is not less than its total liabilities, including capital stock. . ."

Therefore, even at "slightly less than $100,000" (N.T. 29) the capital of the Exeter bank was never impaired.

The defalcation did not involve loans and the certified audit shows the loans were not as described by the Comptroller. Without any explanation about any particular loan, he somehow decided that the capital structure

of the bank was slightly less than $100,000.00 (N.T. 29) from an original $351,000.00 (Supp. App. 45a). This hardly seems reasonable or proper considering the fact that Mr. Abrahamson stated in Depositions that the affairs of the bank were satisfactory at the time of the last examination (Supp. App. 11a). The date of this examination does not appear in the record but the Comptroller will not disagree that it occurred within thirty days prior to January 29, 1962.

In addition to the above, Mr. Abrahamson's testimony and computations prove that the "substandard. doubtful and uncollectible loans" reason came into existence *after* February 26, 1962. *The Comptroller knew on February 26, 1962, the final figure on the defalcation was $459,710.22* (Supp. App. 32a—N.T. 21). The testimony of Mr. Abrahamson was as follows (N.T. 28, 29):

> "Q. Now, sir, in the course of your investigation of this shortage, did you consider or did you examine any of the loans at the bank?
>
> A. We certainly did.
>
> Q. And what conclusions did you come to with reference to those loans?
>
> A. Well, we determined that a certain number of them were losses, a certain number were doubtful and some where substandard.
>
> Q. Can you give us, for the benefit of the Court, some idea as to the percentage of these loans or the amounts of them?
>
> A. This would be from memory. I could only say that after taking the capital structure of the bank and adding to it the $200,000 dollar primary bond and deducting therefrom the known loss and the paper

that we considered reasonably uncollectible, there only remained about slightly less than $100,000 of capital funds."

The net result is as follows:

Comptroller's capital fund figure (N.T. 19)	$350,000.00
Add Primary Bond	200,000.00
Total Capital:	$550,000.00
Deduct Known Loss	459,710.22
Net Capital:	$ 90,289.78

If the Comptroller thought or decided there were substandard, doubtful or uncollectible loans as of February 26, 1962, it would be impossible for Mr. Abrahamson to say *"there only remained about slightly less than $100,000.00 of capital bonds"* (Emphasis added).

It is crystal clear that there were no substandard, doubtful or uncollectible loans and that this excuse was only thought up after this lawsuit was commenced. A reasonable man could not conclude otherwise.

It is important to this case that the only accounts affected by the manipulation of August Lippi and George Daileda were savings accounts. Even if the Comptroller completely disregarded the validity of the excess bond, he knew that there were only "twelve or so accounts" in excess of $10,000.00, with a total of approximately $170,000.00, which was not covered by Federal Deposit insurance (N.T. 40). The certified audit (Supp. App. p. 58a) shows

that 67 accounts were affected (Supp. App. pp. 59a-61a) and there was a total of 3,412 time and demand deposit accounts, thus resulting in the fact that only a little more than 2% of the accounts were affected. All of these accounts were covered by F.D.I.C. insurance up to $31,420,000.00. Since there was no question whatsoever on the first $200,000.00 of Fidelity bond coverage, it is simple arithmetic that there was more than a sufficient amount of insurance to cover all the affected savings accounts with $30,000.00 of coverage unused. Consequently, no depositor of the bank could sustain any loss. Creditors couldn't possibly be affected by money being taken from savings accounts that were fully insured. *Even if a receiver were appointed there was more than enough insurance to cover each and every account and to pay every depositor in full without the $1,000,000.00 policy.*

Further, the capital structure of the bank indicated that it was progressing as evidenced by the fact that the undivided profits account increased approximately $3,000.00 in January, 1962, and was up to $54,192.07 by January 31, 1962, as shown by the certified audit (Supp. App. p. 56a). This is another indication that the bank was neither going downhill nor on the verge of becoming insolvent or on the verge of any other serious problems.

The Comptroller did not consider the true value of the bank's physical assets. Another fact which the Comptroller seemed to disregard is the true value of the physical assets of the bank. The book value of the building and furniture and fixtures was down to $48,341.53, but these items were insured for $80,000.00. The insurance amount is an indication that the building, furniture and fixtures were worth at least $100,000.00 or twice the

book value, when it is taken into consideration that insurance policies of this nature ordinarily provide for coverage to the extent of 80% of the value of the property.

The Comptroller knew the full extent of the loss on or before February 26, 1962.

The Comptroller used as another one of his reasons in deciding that there was an emergency the fact that he did not know where the shortage would end. Even if this was true, *if every penny was taken from every savings account no depositor would have lost one penny because of the F.D.I.C. insurance on all accounts and the $200,000.00 unquestioned primary bond was sufficient to cover the loss in full.*

With regard to F.D.I.C. insurance, the December 1967 issue of the *Kiplinger Magazine Changing Times* stated on page 49:

> "Government insured savings in banks and in savings and loan associations have an unbeatable safety record: Not one penny in these accounts has ever been lost".

The Comptroller knew the shortage mounted rapidly and was $404,000.00 within a day or two after January 29, 1962 (Supp. App. pp. 31a, 32a). He admitted Mr. Daileda kept "good records" of the defalcation (N.T. p. 17). Mr. Saxon ordered an independent audit which began 8:30 a.m. February 1, 1962 (Supp. App. p. 48a). In addition, Mr. Abrahamson and three assistants made their own examination (N.T. p. 15). The Comptroller, charged with the duty of acting as a reasonable man, should have known the full extent of loss in this small community bank within

27 days after the cashier provided him with good records of the defalcation. Judge Follmer found from Mr. Abrahamson's testimony that on February 26, 1962, the date of the termination of the conservatorship and the day of the sale, the shortage was $460,000.00. This was corroborated by the independent auditor who found the final loss to be $459,710.22. Yet, the testimony notwithstanding, Judge Follmer found that the shortage continued to grow after the conservatorship was terminated (Supp. App. p. 109a; Item 21). It would appear that Judge Follmer was endeavoring to continue the "emergency" after February 26, 1962, without any basis of fact contained in the record.

When asked by Attorney Brown at the last trial, Mr. Abrahamson responded to questioning as follows (N.T. pp. 18, 19):

> "Q. And specifically now directing your attention to February 26, 1962, can you tell us what you had determined the amount of the shortage was as of that time?
>
> A. February 26, was that the date that we furnished it to the—
>
> Q. Yes.
>
> A. I believe it was in the neighborhood of $450,000 to $460,000."

It appears obvious that the full amount of the defalcation was known on February 26, 1962, and that Mr. Abrahamson was about to say "February 26, was that the date that we furnished it to the *excess bond carrier*". (Emphasis supplied and added).

Mr. Abrahamson admitted the full amount of the defalcation was known on February 26, 1962, as indicated

by the following Question and Answer at the trial of January 9, 1967:

"Q. Between February 1st and February 26th the additional discovered shortages were approximately how much?

A. *Well from $404,000 to whatever that maximum was, whatever the final figure was on the defalcation. Whether it was $465,000, or $495,000, I don't know*". (Emphasis added).

Since the special audit began February 1, 1962, and the Chief National Bank Examiner and four of his assistants started their own examination on January 29th and 30th, and letters of verifications were mailed to depositors shortly after February 1, 1962, it is apparent that the claim for losses on the 67 affected savings accounts was filed with the Excess bond carrier on or before February 26, 1962 (Supp. App. 59a-61a).

The excess bond carrier filed suit against August Lippi and others in the Middle District of Pennsylvania on February 2, 1962, and was granted an injunction by Judge Follmer to protect it because of the payment it would have to make to the Exeter bank under its excess policy No. 24043. Mr. Abrahamson previously informed the excess bond carrier that the total shortage would be approximately $400,000.00 and that the liability of the excess bond carrier would be approximately $200,000.00. On the basis of the information, the excess bond carrier filed suit against August Lippi and others on February 2, 1962, in the Middle District of Pennsylvania, and nowhere in that suit was there even an inference that the excess carrier was denying liability. To the contrary, the

affidavit of the Claims Manager dated February 1, 1962, stated that the company was seeking a preliminary injunction without a hearing "because immediate and irreparable loss, injury or damage will result to the First National Bank of Exeter and to the plaintiff under its undertaking to said bank" under Excess policy No. 24043 in the amount of $1,000,000. (Supp. App. 93a) since demand was made upon the carrier by the Exeter bank for payment of its losses in excess of $200,000.00.

The Complaint stated that the Federal Warrants of January 29, 1967, charged Mr. Lippi and Mr. Daileda with a defalcation of $397,948.78. Judge Follmer was evidently convinced of the statements contained in the Complaint of the excess bond carrier because at 12:30 on February 2, 1962, without hearing, he issued the Preliminary Injunction restraining all the defendants[8] from transferring, mortgaging, pleading, or otherwise disposing of any property owned by them or in which they had an interest (Supp. App. 93a-95a). The lower court found itself in the anamolous position of granting an injunction based on the excess carrier's averred liability pursuant to the terms of its excess policy No. 24043 and then accepting Mr. Saxon's statement contrarywise that the carrier was denying liability. Though the carrier formally denied coverage subsequently, this was not done until after the appointment of a conservator.

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[8] The defendants in that suit were August Lippi, Chairman of the Board of the Exeter Bank, Lena Lippi, his wife, Ettore J. Lippi, President of the Exeter Bank and son of August Lippi, John A. Lippi, Director of the Exeter Bank and son of August Lippi, Dr. Joan Ochreiter, daughter of August Lippi, Dr. Jerome Ochreiter, son-in-law of August Lippi, George Daileda and the First National Bank of Exeter.

To compound his error, on February 26, 1962, Judge Follmer issued an order on stipulation of counsel for all parties, dissolving the injunction and ordering the action discontinued *without prejudice.* The stipulation stated:

> "the plaintiff desires to dissolve said restraining order and to discontinue said action, without prejudice..."

It did not state that there was no liability on the excess bond No. 24043, nor did it in any way whatsoever infer there was no liability on the bond.

Certainly the Comptroller was aware of this suit because the First National Bank of Exeter was a defendant and the Comptroller's agents were at the Exeter Bank from January 29, 1962 until February 26, 1962.. A reasonable Comptroller would have given very serious consideration to this suit and would have concluded that the excess policy was valid. Further, a reasonable Comptroller, even if he had doubt about the validity and enforceability of the policy, would have concluded that at worse a settlement would be obtained. He should also have known that the contract was thoroughly legal and completely binding upon the excess carrier. It must be remembered that Mr. Abrahamson who was on the scene during most of the period from January 30th until February 26th, was a man of forty years experience and was the Chief National Bank Examiner from the Philadelphia Office.

Since the injunction was granted on February 2, 1962, and it was dissolved and the suit discontinued without prejudice on February 26th, 1962, the Comptroller knew or should have known that the injunction was in effect

on February 19, 1962, when he appointed a conservator. The Conservator and the injunction were powerful aids for the Comptroller. A reasonable Comptroller would feel the Exeter bank was very secure and that there was no emergency.

It cannot be mere coincidence that August Lippi negotiated for the sale on February 25, 1962, a Sunday; the sale of the assets of the bank took place on Monday, February 26, 1962; the contract of sale was signed on the late afternoon of February 26, 1962; the Comptroller approved the sale on the early evening of February 26, 1962; and the injunction was dissolved on February 26, 1962. When the injunction was dissolved by stipulation the Comptroller had every reason to believe that a settlement had been effected with the excess bond carrier.

The withdrawal of Director Santarelli did not affect the capital of the bank, had no affect on the bank, and had nothing whatsoever to do with the alleged emergency. The Comptroller also used as a reason for declaring an emergency the fact that Director Santarelli withdrew approximately $163,000.00 or $167,000.00 from his accounts (N.T. 33). The fallacy of this reasoning is shown by the following:

(a) Mr. Saxon knew that Mr. Santarelli, a director, was not a member of the Lippi group and that he operated a large concrete mixing business (Supp. App. 22a).

(b) Mr. Saxon knew Mr. Santarelli issued a check in the ordinary course of his business prior to January 29, 1962, and it was presented for payment

on January 30, 1962 (Supp. App. 23a). A portion of the $163,000.00 withdrawal was included in that check.

(c) Mr. Saxon knew that some of Mr. Santarelli's withdrawals were before the defalcation and some were before the appointment of a conservator (Supp. App. 22a, 23a, 33a).

(d) Mr. Saxon admitted that Mr. Santarelli's withdrawals did not affect the capital of the bank (Supp. App. 33). This being so, these withdrawals did not impair the capital of the bank and thus did not contribute to or create the so-called emergency of February 26, 1962.

(e) Mr. Saxon knew that Mr. Santarelli and his brother had a total of $196,509.67 in savings accounts that were affected by the defalcation (Supp. App. 59a, 60a).

(f) Mr. Saxon knew or should have known that Mr. Santarelli did not withdraw all of his accounts but, on the contrary, left at least $33,509.57 in his accounts that were manipulated (Supp. App. 59a-61a). This does not include his business checking account which quite obviously would be very substantial!

The lower court erroneously found that Mr. Santarelli "withdrew his accounts amounting to between $160,000 and $167,000 prior to the appointment of the Conservator", thereby indicating that Mr. Santarelli withdrew *all* his money. The above figure shows this to be incorrect.

The Comptroller completely disregarded legal and valid corporate activity of the Exeter bank on February 19, 1962, when the directors sold the bank to the First

National Bank of Pittston, yet the Comptroller approved the illegal activity of the Lippi group on February 26, 1962, when they tried to sell the Exeter bank to the Wyoming Bank. For some unknown reason the Comptroller disregarded legal and valid corporate activity by the Exeter bank directors on February 19, 1962, when they, in fact, had voted to accept an offer of the First National Bank of Pittston before the Conservator was appointed (Orig. App. pp. 125a, 126a; Findings of Fact Nos. 4, 5, 6). He refused to accept this legal activity, yet seven days later he approved the subsequent illegal activity of the Lippi group in their attempted sale on the morning of February 26th, while the Conservator was in charge. A reasonable man wouldn't possibly do the opposite thing the Comptroller did on February 19th and February 26th, 1962. This is further indication of the fact that the Comptroller did not act as a reasonable man in declaring an emergency at the Exeter bank on February 26, 1962.

Six banks were interested in buying the Exeter bank and four banks made offers to purchase. There are a multitude of additional facts to prove that a reasonable man could not have concluded that an emergency existed at the Exeter bank, and therefore the Comptroller should not have concluded there was an emergency. To begin with, there were six other banks in the community which showed an interest in buying the Exeter bank and in fact four banks made concrete offers. It was admitted that these two items made the Comptroller very happy. Things were such that the Exeter bank was obviously in a good bargaining position with four buyers and could be selective if the shareholders decided on voluntary dis-

solution. The Comptroller should have known that the Exeter bank was not going downhill or on the verge of insolvency or anything near such circumstances when he had opportunity to compare those offers, and compare the original offer of the Wyoming Bank of a straight $108,000.00 bonus made on February 9, 1962, as against its second offer of $120,000.00, plus 40% of any recovery on the excess bond made on February 26, 1962. If the Exeter bank was in an emergency or on the verge of insolvency, why would the Wyoming Bank increase its offer by $12,000.00, plus 40% of the excess bond within seventeen days? If a buyer had a seller who is in an emergency, the buyer would be decreasing the offer, not increasing it. This increased offer is additional proof that a reasonable man would not have concluded there was an emergency at the Exeter Bank.

Mr. Saxon's conduct after February 26, 1962, is further proof that he never thought there was an emergency on February 26, 1962, and he did not have authority to waive shareholder approval for voluntary dissolution. Plaintiffs submit that Mr. Saxon's conduct after February 26, 1962, is very important because it is further proof of the fact that he never thought there was an emergency on that day and he realized the sale by the Lippi group was illegal, and further that a reasonable man would not have concluded there was an emergency. Apparently admitting that no emergency existed, Mr. Saxon submitted to the directors (the identical Lippi group controlling) on March 26, 1962, the question to vote on a ratification of the Board's action taken between 10:00 and 12:00 a.m. on February 26, 1962. Doesn't it seem absurd to ask the same majority directors on March 26,

1962, to approve action which they took on February 26, 1962? Would a reasonable man do that? Isn't this further evidence that Mr. Saxon was trying on March 26, 1962 to make something legal that he knew was illegal on February 26, 1962? Further, how could Mr. Saxon ask the Lippi group on March 26, 1962, to ratify the illegal activity of the same Lippi group on February 26, 1962, when the law is clear that there can never be a ratification of an illegal contract? *Dillon Read & Co. vs. Commerical State Bank,* 62 F. 2d 606, 608, C.C.A. Pa. 1932, 3rd Circuit. Are these acts of a reasonable person?

Why did Mr. Saxon submit to the shareholders on April 26, 1962, the question for them to vote on voluntary dissolution?[9] If there was an emergency and the bank was sold on February 26, 1962, and he approved the sale at that time, and he had authority to waive shareholder approval, why was it necessary to have the shareholders vote on voluntary dissolution two months later? Mr. Saxon had already taken the position prior to April 26, 1962, that because there was an emergency he did not need shareholders approval to sell the bank. Now he is admitting there never was an emergency and in fact he did need two-thirds shareholder approval before the bank could be sold. It appears that Mr. Saxon, in seeking shareholder approval of voluntary dissolution on April 26, 1962, admitted that there was no emergency, the sale was illegal, and he had no authority whatsoever to waive the shareholder approval. This is further evidence of Mr. Saxon's admitting that there never was an emergency or

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[9] The proposal was turned down by a vote of 1628 in favor and 1215 against (372 votes less than the required two-thirds of the 3000 shares outstanding).

that even if there were an emergency he could only waive the two-thirds shareholder approval of the purchase and sale agreement and he could not waive the shareholder approval to go into voluntary liquidation in the first place. It is further evidence that Mr. Saxon knew that the Lippi group had no authority to sell the bank while he was in charge through his Conservator. It is proof that a reasonable man would not have declared an emergency.

Notwithstanding all of the foregoing facts, on April 10, 1962, the Comptroller filed a motion for summary judgment which included an affidavit dated March 28, 1962. The affidavit stated:

> "On January 29, 1962, there was disclosed a shortage in excess of $300,000.00. . ."

It further stated:

> ". . . *by February 26, 1962, I had concluded that the bank was insolvent and that unless immediate steps were taken to reorganize or sell the bank, the Federal Deposit Insurance Corporation should be appointed Receiver for the purpose of liquidating the bank and paying the depositors and creditors.*" (Emphasis added.)

On April 11, 1962, one day after filing the motion for summary judgment, Mr. Saxon wrote a three page letter (Supp. App. pp. 36a-40a) to the Honorable Brent Spence, Chairman of the Committee on Banking and Currency of the House of Representatives of the United States wherein he said:

(a) ". . . there was doubt as to whether it could be held to be technically insolvent";

(b) ". . . A receiver may be appointed by the Comptroller only if he is satisfied that the bank is insolvent";

(c) ". . . There was no alternative but to seek some satisfactory means of conserving the assets of the bank until the full amount of defalcation could be ascertained, the liability or lack of liability of the bonding company could be better established, and there could be determined whether a prompt sale or reorganization of the bank could be accomplished";

(d) "there was reason to believe the bank could be sold";

(e) "In spite of its difficulty the bank at no time lost the confidence of the banking public in Exeter";

(f) ". . . There was no run nor heavy withdrawal of deposits";

(g) "A number of sound and well managed banks in the area had expressed an interest in acquiring the bank";

(h) "Such an acquisition would, of course, ensure the continuation of sound adequate banking service in the community with all deposits immediately available and a minimum of harmful publicity. *This would clearly be preferable to receivership even if I had had legal authority to place the bank in receivership*"; (Emphasis added.)

(i) "During the seven days of the conservatorship, the bank continued to have the confidence of the public, and although withdrawal of funds was limited

to 10 percent there was no rush on the part of depositors to withdraw the amount permitted, but the bank continued to operate in the usual way subject to the limitation";

(j) "On two previous occasions since I have held this office, I have placed institutions in receivership as the facts in those cases clearly warranted such action. *In the Exeter case, I could not reasonably have done so at the time the bank was placed in conservatorship.*" (Emphasis added.)

(k) "In Exeter, the proper tool was unquestionably the conservatorship . . .".

A reasonable man would not say to Judge Follmer by affidavit dated March 28, 1962, that the Exeter Bank was insolvent and a receiver should be appointed, and then by letter dated April 11, 1962, say to the Chairman of the Committee of Banking and Currency of the House of Representatives of the United States that the bank was not insolvent and a receiver could not have been appointed under these circumstances. A reasonable man would conclude that Mr. Saxon had a double standard—one when he presented facts to a judge and another when he presented facts to a Congressman. It appears that the lower court failed to consider these contradictory statements on a vital issue in arriving at its decision.

Finally, petitioners point out to Your Honorable Court that the Comptroller of Currency could at any time have obtained the assistance of the Federal Deposit Insurance Corporation under the Act of September 21, 1950, c. 967, Section 2 (1), 64 Stat. 873, 12 U.S.C.A. 1823, c., at page 375, which provides:

"In order to reopen a closed insured bank or, when the Corporation has determined that an insured bank is in danger of closing, in order to prevent such closing, the Corporation, in the discretion of its Board of Directors, is authorized to make loans to, or purchase the assets of, or make deposits in, such insured bank, upon such terms and conditions as the Board of Directors may prescribe, when in the opinion of the Board of Directors the continued operation of such bank is essential to provide adequate banking service in the community. Such loans and deposits may be in subordination to the rights of depositors and other creditors."

Petitioners further call to the attention of this Honorable Court the statement contained in the U.S. Code Congressional Service, volume 2, 81st Congress, Second Session 1950, Legislative History, at page 3765 and 3766, a portion of the general statement from the House Report No. 2564 dated July 14, 1950, concerning the Federal Deposit Insurance Act and an Amendment thereto as follows:

"The Federal Deposit Insurance Corporation was established under authority of section 8 of the Banking Act of 1933, and section 101 of the Banking Act of 1935 which became effective August 23, 1935 and provided the permanent plan of deposit insurance contained in existing law. Insurance of bank deposits by the Corporation began on January 1, 1934. The results since that date bespeak the outstanding record the Corporation has achieved in bringing to depositors sound, effective, and uninterrupted operation of the banking system with resulting safety and

liquidity of bank deposits. There has been no failure of an insured bank since 1944. From inception of the Corporation through December 31, 1949, there had only been 411 cases of receivership or merger of insured banks. Such a record is quite in contrast to that preceding the creation of the Corporation. Leaving out of consideration the period 1930 to 1933, inclusive, when there was an abnormally high number of bank suspensions (9,106) and taking the 16-year period 1914 to 1929, inclusive, the record shows that there were nevertheless 6,392 cases of bank suspensions."

(G)

There Can Be No Estoppel in This Case

There can be no claim of estoppel for several reasons. To begin with, the Wyoming bank and Mr. Abrahamson were notified immediately on the late afternoon of February 26, 1962, at the Wyoming bank that there would be court action to prevent the illegal sale to the Wyoming bank. The depositions of Marshall Abrahamson in the Supplemental Appendix, pages 23a, 24a, indicate the truth of the foregoing statement as can be observed from the following questions and answers:

"Q. All right. And did you make an announcement that because of the impending attack upon the contract, that you suggested 2 paragraphs be changed, and you did in fact—

A. I could have—

Q. —and they did in fact change 2 paragraphs—do you remember that?

A. I could have. Honestly, I don't know, but I could have.

Q. Because of the attack that Dalessandro was going to make on the contract, they changed 2 paragraphs in the contract?

A. Could have.

Q. Not could have—this was so, wasn't it?

A. Honestly I don't remember.

Q. And you got the approval of the Comptroller to do that, didn't you?

A. I can't remember."

It is hardly possible that a man of forty years experience in the banking field who testified to so many

other specific facts would not remember that he was told about the court action and that as a result of this two paragraphs were, in fact, changed in the sales agreement. It seems clear that when he answered the questions "I could have" at four different times that this is an admission that he and the Wyoming Bank were told by Attorney Dalessandro that court action would follow and that he did in fact make a change in two paragraphs in the agreement. Was the 40% clause inserted because of this? Did the Comptroller know there was going to be some recovery on the excess policy?

Secondly, Attorney Dalessandro 'phoned Mr. Saxon on February 26, 1962, informing him of the fact that there was an offer of the First National Bank of Pittston accepted on February 19, 1962, and further, urging Mr. Saxon to correct the illegal activity of the Lippi group and to correct his own abuse of discretion in approving the illegal and void sale to the Wyoming bank. On March 6, 1962, eight days after the sale to the Wyoming National Bank, this action was commenced.

The activities of the minority directors can hardly be said to impose an estoppel upon plaintiffs. The doctrine of estoppel only applies to a person who has a duty to speak.

Hill vs. Epley, 31 Pa. 331;

Huss vs. Jacobs, 210 Pa. 145, 161;

Fried vs. Fisher, 328 Pa. 497, 500.

There was no duty imposed on any minority directors or shareholders to speak up about the fact that the Lippi directors had no authority to act on behalf of the Exeter

bank while the Conservator was there. This would be equivalent to saying that the silence of the minority would make something legal that was illegal, even though a court order couldn't transform the same illegal act into a legal act. It would also be equivalent to saying that the silence of the minority is a substitute for the statutory duties of the Conservator.

Further, even if there were estoppel, the law is that estoppel can operate neither in favor of nor against a stranger.

Antone vs. New Amsterdam Cas. Co., 335 Pa. 134.

The doctrine of estoppel is inapplicable to a party incapable of making the contract.

First National Bank of Verona vs. Walsh, 349 Pa. 241;

Binns vs. First National Bank of Col. Pa., 367 Pa. 359, 363.

In the case of *Wyatt vs. Mount Airy Cemetery*, 224 A. 2d 787, p. 791, 1966, 209 Pa. Superior Ct. 250, where a holder of an indebtedness certificate was a member of the Board of Trustees at the time the Board passed a resolution that all indebtedness on the certificates would be considered paid in full, the court held that the failure of that holder to dissent from the Board's action did not estop him from raising a right to payment of interest on the certificates.

It is also clear that there can be no estoppel when each party has equal knowledge of the facts.

Culbertson vs. Cook, 308 Pa. 557;

Appeal of Duquesne Bank, 74 Pa. 426.

Certainly, the Wyoming Bank knew that the Board of Directors of the Exeter bank could not act when a conservator was in charge, and they cannot now come to court and say that they are hurt or prejudiced by entering into a contract that they knew was illegal. In addition, the Wyoming Bank can't claim estoppel against the plaintiffs because it was the Comptroller who misled it and not the plaintiffs. The Comptroller misled the Wyoming Bank by approving the illegal sale by the Lippi group.

The Wyoming Bank cannot claim estoppel because it is charged with notice of the limitation of the authority of the conservator.

Scrhom vs. Brooks, 41 F. Supp. 874, D.C. Mich. 1942.

The Wyoming Bank is presumed to know that a conservator is an agent whose authority is limited by law and the Wyoming Bank is presumed to have knowledge of his authority to act.

Oosterhuis vs. Palmer, 137 Fed. 2d 322, 153 A.L.R. 475;

Roth vs. Hood, 106 F. 2d 616, C.C.A. Ohio, 1940.

Finally, a derivative cause of action which a shareholder brings under F.R.C.P. 23 is not his own but it is the corporation's cause of action and the corporation is the real party in interest.

Curtis vs. Metcalf, 259 F. 2d 961;

Montgomery Ward vs. Langer, 168 F. 2d 182, 187 (8th Circuit).

The Exeter bank was incapable of making the contract in the first instance and, therefore, there can be no estoppel because of that fact.

This Honorable Court indicated that the ratification and approval by the Lippi group on March 26, 1962, of the illegal act by the identical Lippi group on February 26, 1962, made moot the question of lack of authority of that group to make the sale on February 26, 1962.

The case of *Wilson vs. Awalt,* 2 F. Supp. 465 (D.C. Pa.) held that the officers or agents of the bank are precluded from dealing in any way with the bank assets while the receivership continues and even the shareholders are precluded from dealing in any way with the assets of the bank while the receivership continues.

This being so, the Board of Directors had no authority on February 26, 1962, to make any contract and their acts on that day would be illegal and also equivalent to an ultra vires act and as such, void.

Houston vs. Drake, C.C.A. Ariz., 91 F. 2d 863.

And such a contract cannot be rendered enforceable by the doctrine of estoppel.

Birdsell Manufacturing Company vs. Pennsylvania, C.C.A. Ky., 24 F. Supp. 571, aff. 104 F. 2d 340.

It is clear that estoppel does not apply to a contract which was void or illegal at its inception.

In *Dillon Read & Co. vs. Commerical State Bank,* C.C.A. Pa. (1932), 3rd Cir., 62 F. 2d 606, p. 608, the Court stated about a void and illegal contract:

"The contract cannot be ratified by either party because it could not have been authorized by either."

VIII.

CONCLUSION

Petitioners have presented this Petition in a very detailed manner, even to the point of repeating facts, argument and citation because of the extreme importance of the case to the Petitioners and also because of the great importance of the issues to national banking. It is respectfully requested that this Honorable Court accept jurisdiction of this case.

ARTHUR D. DALESSANDRO
JOSEPH J. USTYNOSKI
ANTHONY C. FALVELLO

APPENDIX

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 14,175

Albert J. Minichello, Nicholas Mauriello and Ygnats Yuchnis, on a Derivative Action on Behalf of Themselves and on Behalf of Other Stockholders of the First National Bank of Exeter Similarly Situated, Incorrectly Described in the Summons and Complaint as Albert J. Minichello, Nicholas Mauriello and Ygnatz Yuchnis,

Appellants

v.

James J. Saxon, Comptroller of Currency of the United States of America; First National Bank of Exeter; Wyoming National Bank of Wilkes-Barre; August J. Lippi; Ettore Lippi; John Lippi; John B. Campbell; George Maffei and Harold Reich

Appeal from the United States District Court for the Middle District of Pennsylvania

Appendix

MEMORANDUM FILED JULY 2, 1962

(207 F. Supp. 299)

The plaintiffs, Albert J. Minichello, Nicholas Mauriello and Ygnatz Yuchnis, on a derivative action on behalf of themselves and on behalf of other stockholders of the First National Bank of Exeter similarly situated, instituted an action against James J. Saxon, Comptroller of Currency for the United States of America, the First National Bank of Exeter, the Wyoming National Bank of Wilkes-Barre, and various directors of the Exeter bank, seeking to set aside a sale of the assets of the First National Bank of Exeter to the Wyoming National Bank of Wilkes-Barre. The Comptroller of Currency has filed a Motion to Dismiss as to him.

The prayers for relief as affecting the Comptroller are listed in the Complaint as follows:

> "1. Enjoin the Comptroller of Currency from appointing a Conservator for the First National Bank of Exeter hereafter.
>
> "2. Issue an order declaring that the appointment of a Conservator for the First National Bank of Exeter was an abuse of discretion by the Comptroller of Currency of the United States.
>
> • • • • • • • • •
>
> "8. Direct the Comptroller of Currency to revoke his approval of the contract between the First National Bank of Exeter and the Wyoming National Bank of Wilkes-Barre.
>
> • • • • • • • • •

"11. Direct the Comptroller of Currency to provide the plaintiffs with a copy of the articles of association and the by-laws of the First National Bank of Exeter.

"12. Direct the Comptroller of Currency to return the affairs of the First National Bank of Exeter to its Board of Directors.

. . . . . .

"14. Enjoin the Comptroller of Currency, his agents, servants and subordinates, from interfering in any manner whatsoever with the contractual rights and obligations of the First National Bank of Exeter now existing or hereafter existing."

As far as the Comptroller is concerned, what this Complaint seeks to do is to ask this Court to interfere with the Comptroller's exercise of his discretion. To paraphrase the statement of Judge Freedman in Community National Bank of Pontiac v. Ray M. Gidney, D.C. E.D. Mich., 192 F. Supp. 514, 519 (1961), this Court is of the opinion that Congress intended that the Comptroller have an exclusive and unreviewable power of discretion in determining whether or not to appoint a conservator (12 U.S.C. §203) or terminate a conservatorship (12 U.S.C. §205) or to approve or disapprove a sale of the assets of a bank, as here, by the directors of the First National Bank of Exeter to the Wyoming National Bank (12 U.S.C. §1828 (e)) (See also, Adams v. Nagle, 303 U.S. 532 (1938)). The Comptroller's "jurisdiction in respect to all matters properly within his discretion is exclusive, and he is in respect thereto in no manner amenable to any court, nor is his action subject to review

therein." Liberty Nat. Bank of South Carolina, at Columbia et al. v. McIntosh et al., 4 Cir., 16 F. 2d 906, 909 (1927).

The issue in the present action is whether there was or was not a valid sale by the directors of the First National Bank of Exeter to the Wyoming National Bank of Wilkes-Barre, and for the determination of that issue there is nothing in this Complaint which affords any basis for the retention of the Comptroller of Currency in this action. Motion To Dismiss will accordingly be granted.

(s) Frederick V. Follmer
United States District Judge

July 2, 1962

ORDER

Now, July 2, 1962, for the reasons stated in Memorandum this day filed, It is hereby Ordered and Decreed that the motion of James J. Saxon, Comptroller of Currency for the United States of America, to dismiss the Complaint for the reason that it fails to state a cause of action as to him for which the Court might grant relief be and the same is hereby granted, and the Complaint as to James J. Saxon, Comptroller of Currency of the States of America, is hereby dismissed.

(s) Frederick V. Follmer
United States District Judge

Appendix

UNITED STATES COURT OF APPEALS
For the Third Circuit

No.

Albert J. Minichello, Nicholas Mauriello and Ygnats Yuchnis, on a Derivative Action on Behalf of Themselves and on Behalf of Other Stockholders of the First National Bank of Exeter Similarly Situated, Incorrectly Described in the Summons and Complaint as Albert J. Minichello, Nicholas Mauriello and Ygnatz Yuchnis,

Appellants

v.

James J. Saxon, Comptroller of Currency for the United States of America; First National Bank of Exeter; Wyoming National Bank of Wilkes-Barre; August J. Lippi; Ettore Lippi; John Lippi; John B. Campbell; George Maffei and Harold Reich

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Appeal from the United States District Court for the Middle District of Pennsylvania

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OPINION (FILED JULY 12, 1963)
(Unreported)

The plaintiffs, Albert J. Minichello, Nicholas Mauriello and Ygnatz Yuchnis, on a derivative action on behalf of

themselves and on behalf of other stockholders of the First National Bank of Exeter similarly situated, instituted an action against James J. Saxon, Comptroller of Currency for the United States of America, the First National Bank of Exeter, the Wyoming National Bank of Wilkes-Barre, and various directors of the Exeter bank, seeking to set aside a sale of the assets of the First National Bank of Exeter to the Wyoming National Bank of Wilkes-Barre.

On July 2, 1962, the Court issued an Order dismissing the Complaint as to James J. Saxon, Comptroller of the Currency of the United States of America.

The prayers for relief as affecting all defendants, exclusive of the Comptroller of the Currency, are listed in the Complaint as follows:

"3. Declare that the contract entered into on February 26, 1962 by and between the Wyoming National Bank of Wilkes-Barre and the First National Bank of Exeter is void and of no legal significance.

"4. Enjoin all defendants from doing any action whatsoever under the contract of February 26, 1962.

"5. Enjoin the defendants from doing any act whatsoever in connection with any transfer of assets of the First National Bank of Exeter to any person, entity, corporation or association.

"6. Direct the Wyoming National Bank of Wilkes-Barre to return to the First National Bank of Exeter every and all books or items of any kind or

nature which belong to the First National Bank of Exeter.

"7. Issue an order removing the following members from the Board of Directors of the First National Bank of Exeter: August J. Lippi, Ettore Lippi, John Lippi, John B. Campbell, George Maffei and Harold Reich.

• • • • • • • •

"9. Order the officers and directors of the First National Bank of Exeter to submit to the shareholders every and all offer (sic) now existing or hereafter obtained for the sale of the assets of the First National Bank of Exeter.

"10. Enjoin all defendants from taking any action whatsoever with respect to the affairs of the First National Bank of Exeter contrary to any applicable laws.

• • • • • • • •

"13. Enjoin the following defendants from transferring in any manner whatsoever any property which they now own or control: August J. Lippi, Ettore Lippi, John Lippi, John B. Campbell, George Maffei and Harold Reich.

• • • • • • • •

"15. Such other relief as the court may deem proper under the circumstances."

The case was tried to the Court without a jury. At the conclusion of the case and arguments of counsel, the Court granted the motion to dismiss.

For the record the Court makes the following Findings of Fact and Conclusions of Law and confirms its previous action in orally dismissing the Complaint:

FINDINGS OF FACT

1. Ten directors constituted the Board of Directors of The First National Bank of Exeter.

2. On or about January 29, 1962, a defalcation of approximately $200,000.00 was discovered at The First National Bank of Exeter and thereafter said defalcation reached a figure in excess of $400,000.00.

3. By letter dated February 15, 1962, The First National Bank of Pittston offered to assume stated liabilities of The First National Bank of Exeter, purchase acceptable assets to cover the same and pay a premium to it of $186,500.00. This letter further provided that the net value of assets over liabilities plus the premium were to be held in escrow for a period of six months, out of which losses not covered by the primary and excess bonds of The First National Bank of Exeter and claims against undisclosed shortages were to be charged.

4. At a special meeting of the Board of Directors of The First National Bank of Exeter held on February 19, 1962, it was regularly moved and seconded that the offer of The First National Bank of Pittston be accepted.

5. The vote on the aforesaid motion was four in favor, three against, and one not voting.

6. Upon completion of said vote and the announcement of said vote, Mr. Mauriello who had voted against

the motion informed the Chairman of the meeting that he was changing his vote to an affirmative vote on the said motion.

7. On the evening of February 19, 1962, the Comptroller of the Currency appointed Russell Gardner as Conservator of The First National Bank of Exeter.

8. By letter dated February 22, 1962, The First National Bank of Pittston informed The First National Bank of Exeter that it was withdrawing its offer of February 15, 1962.

9. On the morning of February 26, 1962, The Wyoming National Bank of Wilkes-Barre offered to assume all the liabilities of The First National Bank of Exeter, except its liabilities to its shareholders, accept all its assets and pay a premium of $120,000.00 plus 40% of any recovery on its excess bond.

10. At a special meeting of the Board of Directors of The First National Bank of Exeter held on the morning of February 26, 1962, the offer of The Wyoming National Bank of Wilkes-Barre was accepted by a vote of six in favor and three not voting.

11. At a special meeting of the Board of Directors of The Wyoming National Bank of Wilkes-Barre held on the afternoon of February 26, 1962, and attended by the nine directors of The First National Bank of Exeter who had attended its Board meeting on the morning of the same day, the action of the officers of The Wyoming National Bank of Wilkes-Barre in making the offer of February 26, 1962, was ratified and approved unanimously

by the Board of Directors of The Wyoming National Bank of Wilkes-Barre.

12. On February 26, 1962, at said special meeting of The Wyoming National Bank of Wilkes-Barre, none of the nine directors of The First National Bank of Exeter expressed any disagreement with the action taken.

13. On February 26, 1962, the Comptroller of the Currency terminated the Conservatorship, effective as of the close of business on February 26, 1962 for the purpose of returning the control of the affairs of The First National Bank of Exeter to its Board of Directors for the purpose of executing a sale of all the assets of the Bank to The Wyoming National Bank of Wilkes-Barre.

14. On February 26, 1962 the Comptroller of the Currency declared the existence of an emergency in the affairs of The First National Bank of Exeter and specifically waived the approval by the shareholders of The First National Bank of Exeter of the Purchase and Sale Contract between The Wyoming National Bank of Wilkes-Barre and The First National Bank of Exeter.

15. The Purchase and Sale Agreement was executed by the proper officers of both Banks late on the afternoon of February 26, 1962 and was thereafter approved by the Comptroller of the Currency.

16. At a meeting of the Board of Directors of The First National Bank of Exeter held on March 26, 1962, the written Purchase and Sale Agreement between The First National Bank of Exeter and The Wyoming National Bank of Wilkes-Barre dated February 26, 1962 was ratified and confirmed by a vote of six votes in favor of the motion and three votes against it.

17. An offer to purchase of The Kingston National Bank to The First National Bank of Exeter provided for a premium of $108,000.00 and provided that in the event the total price of the assets, together with the premium of $108,000.00 did not equal the deposit liability assumed by the purchaser, the purchaser had the option to accept an assignment of the primary and excess bonds of the seller or declare the agreement terminated without liability.

18. The aforesaid offer of The Kingston National Bank was withdrawn on February 20, 1962.

19. An offer of the Miners Savings Bank of Pittston to The First National Bank of Exeter provided for the assumption of deposit liabilities and the acquiring of sufficient acceptable assets of The First National Bank of Exeter to cover the said liabilities. This offer further provided for a payment or a credit of $125,000.00 to The First National Bank of Exeter for the bank building, furniture, fixtures and contents of the bank buildings, all of which had a book value of $40,341.03.

20. No action was taken by the Board of Directors of The First National Bank of Exeter relative to this offer.

21. The offer of The First National Bank of Pittston was renewed by letter dated February 23, 1962.

22. None of the aforesaid offers to purchase the assets and assume the liabilities of The First National Bank of Exeter were approved by a two-thirds vote of the shareholders of The First National Bank of Exeter.

CONCLUSIONS OF LAW

1. The offer of The Wyoming National Bank of Wilkes-Barre dated February 26, 1962 to purchase the assets and assume the liabilities of The First National Bank of Exeter was the best offer received by The First National Bank of Exeter for its assets.

2. The Purchase and Sale Agreement dated February 26, 1962 between The Wyoming National Bank of Wilkes-Barre and The First National Bank of Exeter is a valid legally binding contract.

3. The individual defendants breached no fiduciary duty by voting to accept the offer to purchase of The Wyoming National Bank of Wilkes-Barre and by executing the written Purchase and Sale Agreement with The Wyoming National Bank of Wilkes-Barre on February 26, 1962.

(s) Frederick V. Follmer,
United States District Judge

July 12, 1963

ORDER

Now, July 12, 1963, in accordance with the above Findings of Fact and Conclusions of Law, the action of the Court on June 25, 1963, in orally granting motion of defendant to dismiss the Complaint is hereby confirmed, and the Clerk of Court is accordingly directed to mark the said action dismissed.

(s) Frederick V. Follmer,
United States District Judge

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 14,560

Albert J. Minichello, Nicholas Mauriello and Ygnatz Yuchnis, on a Derivative Action on Behalf of Themselves and on Behalf of Other Stockholders of the First National Bank of Exeter Similarly Situated, Incorrectly Described in the Summons and Complaint as Albert J. Minichello, Nicholas Mauriello and Ygnatz Yuchnis,

Appellants

v.

James J. Saxon, Comptroller of Currency for the United States of America; First National Bank of Exeter; Wyoming National Bank of Wilkes-Barre; August J. Lippi; Ettore Lippi; John Lippi; John B. Campbell; George Maffei and Harold Reich

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Appeal from the United States District Court for the Middle District of Pennsylvania

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Argued April 15, 1964

Before Biggs, Chief Judge, Hastie, Circuit Judge, and Kirkpatrick, District Judge

Appendix

OPINION OF THE COURT

(Filed September 18, 1964)

By Biggs, *Chief Judge.*

This is a derivative shareholders' action to invalidate a sale of assets of the First National Bank of Exeter ("Exeter bank") to the Wyoming National Bank of Wilkes-Barre ("Wyoming bank"). Plaintiffs are minority shareholders of the Exeter bank. Defendants are the Exeter bank and various members of its board of directors, the Wyoming bank and the Comptroller of the Currency. The plaintiffs have appealed from an order of the court below entered on July 2, 1962 dismissing the action as against the Comptroller and an order of dismissal as against all other defendants entered on July 12, 1963.

The case was tried to the court below without a jury. The essential facts are not in dispute. On or about January 29, 1962 a defalcation of approximately $200,000 was discovered at the Exeter bank. As an audit of the bank progressed the shortage was found to exceed $400,000. Between January 29, 1962 and February 19, 1962, the Comptroller urged that there be a reorganization or a sale of the bank. No progress having been made in respect to either, on February 19, 1962, pursuant to Section 203, 12 U.S.C.A., the Comptroller appointed a conservator for the Exeter bank.

On the morning of February 26, 1962 the Wyoming bank offered to assume all the liabilities of the Exeter bank, except its liabilities to its shareholders, accept all its assets and pay a premium of $120,000. plus 40% of any recovery on its excess bond. Outstanding at this time,

among other offers which need not be detailed, was a purchase offer submitted by the First National Bank of Pittston ("Pittston bank"). This offer was to assume stated liabilities, purchase acceptable assets to cover those liabilities, and pay a premium of $186,500. The Pittston bank proposal was subject to the condition that "the net value of assets over liabilities, plus the premium, will be held in escrow for a period of six months, out of which losses not covered by . . . [Exeter's] primary and excess bonds and claims against undisclosed shortages may be charged."

At a special meeting of the board of directors of the Exeter bank on the morning of February 26, 1962, the offer of the Wyoming bank was accepted by six directors voting in favor and three not voting.[1] At a special meeting of the board of directors of the Wyoming bank on the afternoon of the same day, the action of the officers of the Wyoming bank in making the stated offer was approved unanimously. The nine directors of the Exeter bank who had held their own meeting that morning, attended the directors' meeting of the Wyoming bank and none of them expressed any disagreement with the action taken.

On February 26, 1962 the following telegram dated 6:14 p.m., E.S.T., was sent by the Comptroller to the Exeter bank: "I am now satisfied that it would be in the public interest to terminate the conservatorship of the First National Bank of Exeter and that it may safely be done. Therefore I do thereby terminate the . . . [the] conservatorship, effective February 26, 1962, at which

[1] Ten directors constituted the board of directors of the Exeter bank.

time the assets of the bank and the control of its affairs will be returned to its Board of Directors for the purpose of executing a sale of all of the assets of the bank to the Wyoming National Bank of Wilkes-Barre. Pursuant to Section 5220 United States Revised Statutes [12 U.S.C.A. §181], I have determined that an emergency exists and hereby waive the requirement for shareholder approval of the purchase and sale agreement."

The purchase and sale agreement was executed by the proper officers of both banks late on the afternoon of February 26, 1962. It is not clear from the record at what time the contract was executed and whether the execution was accomplished before or after receipt of the Comptroller's telegram. The agreement was subsequently approved by the Comptroller pursuant to 12 U.S.C.A. §1828(c).

At a meeting of the board of directors of the Exeter bank held on March 26, 1962, the purchase and sale agreement dated February 26, 1962 was confirmed by six directors voting in favor of the confirming resolution. Three directors voted against it.

In the court below the appellants challenged the validity of the contract of purchase and sale between the Exeter and Wyoming banks.[2] The appellants attempted to support their position on several grounds the most basic of which were that the Wyoming offer was not the best offer received by the Exeter bank and that the Exeter board of directors breached their fiduciary duty in accepting it, that in any event the Exeter directors did not have authority

[2] No question of contract interpretation arises in the instant case.

to accept the Wyoming offer on February 26, 1962 because a conservator was in charge of the affairs of the Exeter bank at that time, that the contract was not executed in compliance with national banking law, and that the Comptroller abused his discretion and acted contrary to law in several respects all of which served to invalidate the contract.

The court below granted the Comptroller's motion to dismiss the complaint as to him because the court was of the view that the Comptroller's discretion was exclusive and nonreviewable as to all questions raised in the complaint relating to him. An appeal was taken by the present appellants from the order of dismissal, but that appeal was properly dismissed on the ground that the appeal was not from a reviewable or appealable judgment under 28 U.S.C., Section 1291.[3] After the trial of the case against the remaining defendants the court below concluded that the Wyoming offer was the best offer received by the Exeter bank, that the defendant Exeter directors had breached no fiduciary duty in voting to accept the Wyoming offer, and that the agreement entered into between the Exeter and Wyoming banks was a valid contract.

The appellants have now appealed from the orders dismissing the complaint as to the Comptroller and also as to all the other defendants. The appellants challenge all the findings of the court below. They first assert that the Pittston rather than the Wyoming proposal was the best offer received by the Exeter bank for the sale of its assets. We see no valid basis for disturbing the

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[3] The order was entered on October 17, 1962, at our No. 14,175.

court below's finding on this point. Our conclusion in this regard disposes a fortiori of the appellants' contention respecting the alleged breach of a fiduciary duty on the part of the Exeter directors.

In view of the indefinite nature of some of its terms, it is questionable whether the Pittston offer was capable of a binding acceptance. In any event, the conditioning clause of the Pittston offer contemplated that "claims against undisclosed shortages" were to be charged against the escrow amount. It was well within the realm of possibility that subsequently disclosed shortages could serve to exhaust or at least substantially minimize the amount due the Exeter bank. On the other hand the Wyoming offer was definite and guaranteed the Exeter bank a minimum consideration. Under these circumstances it certainly cannot be flatly stated that the Pittston offer was preferable to that of the Wyoming bank. The decision as to which offer was the more satisfactory lay within the sound business discretion of the Exeter directors.[4]

The appellants next challenge the court below's conclusion respecting the validity of the contract entered into between the Exeter and Wyoming banks. Their attack is based on several grounds. It is first contended that the Exeter directors did not have the power or authority to accept the Wyoming offer on the morning of February 26, 1962 because at that time a conservator was officially in charge of the affairs of the Exeter bank. In our view even assuming the substance of their statement to be

[4] There is no proof other than that which tends to show that the financial interest of the majority directors of the Exeter bank was coincidental with the appellants' own best interest, *i.e.*, to make the most advantageous arrangement possible.

meritorious, it does not follow that the purchase and sale agreement was without effect.

The Exeter directors' acceptance of the Wyoming offer and presumably the actual signing of the agreement by the Exeter officers, took place prior to the termination of the conservatorship. But as the appellants themselves asserted in their complaint in the court below, "on February 26, 1962 the Wyoming National Bank of Wilkes-Barre, through its agents, servants and employees, took over complete operation of the First National Bank of Exeter." After termination of the conservatorship both parties to the contract acted in a manner entirely consistent with the agreement and indeed proceeded to start to carry out its terms. Moreover, on March 26, 1962, as we have said, the contract was formally approved by the Exeter directors by a vote of six to three.

On the basis of these facts, it could be validly concluded either that by their actions subsequent to the termination of the conservatorship the Exeter directors manifested their acceptance of the Wyoming offer or that in view of the reliance demonstrated by the Wyoming bank with respect to the agreement, the Exeter bank is estopped from denying the contract's validity on the technical ground urged here. We think the events which took place subsequent to February 26, 1962 serve to render moot any question concerning the possible incapacity or disability of the Exeter directors and officers to enter into the instant contract while the conservatorship was still in operation.

The appellants next contend that the purchase and sale agreement was invalid because the Comptroller had

no power to terminate the conservatorship of the Exeter bank solely for the purpose of the execution of the sale agreement. Section 205, 12 U.S.C.A. provides as follows: "If the Comptroller of the Currency becomes satisfied that it may safely be done and that it would be in the public interest, he may, in his discretion, terminate the conservatorship and permit such bank to resume the transaction of its business subject to such terms, conditions, restrictions and limitations as he may prescribe." The appellants argue that Section 205 must be read to the effect that the Comptroller is empowered to terminate a conservatorship of a national bank only for the purpose of enabling it to resume its normal everyday business. In our view while this issue is not necessarily a difficult one, under the facts and circumstances of this case no decision on the question is necessary.

It is unquestioned that at all pertinent times, the majority of the Exeter directors were in favor of accepting the Wyoming offer. They in fact purported to accept the Wyoming offer prior to receipt of the Comptroller's telegram and in a fundamental sense the telegram simply manifested approval of their action. We have previously concluded in this opinion that the Exeter directors' favorable inclination towards the Wyoming offer at all pertinent times, in no way serves to demonstrate a breach of fiduciary duty on their part. We are of the view that the appellants have not shown a sufficient causal relation between the Comptroller's order and the execution of the contract in question to give them the requisite standing to attack that order here. The appellant's alleged grievances against the Comptroller directly relate to other considerations which we will now discuss.

The appellants challenge the validity of the contract on the ground that prior to its execution there had not been a vote in favor of liquidation by the Exeter shareholders owning two-thirds of the bank's stock. While the court below made no finding of fact on the point, it appears from the record that the matter of voluntary liquidation was not submitted to the Exeter shareholders until April 26, 1964 at which time the motion in favor of liquidation received majority support but not the necessary two-thirds vote of approval.

Section 181, 12 U.S.C.A., provides in pertinent part as follows: "Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock. If the liquidation is to be effected in whole or in part through the sale of any of its assets to and the assumption of its deposit liabilities by another bank, the purchase and sale agreement must also be approved by its shareholders owning two-thirds of its stock unless an emergency exists and the Comptroller of the Currency specifically waives such requirement for shareholder approval."[5] The first sentence has been the law since June 3, 1864. See 13 Stat. 112 (1866). The second sentence is a recent amendment added to the section on September 8, 1959. 73 Stat. 458.

The House Committee on Banking and Currency in its report to the House concerning the 1959 amendment stated the following: "Section 15 [of H.R. 8159, 86th Cong., 1st Sess. (1959)] provides that if a liquidation of a national bank is to be effected through the sale of any of its assets to another bank in consideration of an assump-

[5] It is unquestioned that Section 181 is applicable to the case at bar.

tion of its liabilities, the approval of the purchase and sale agreement by shareholders owning two-thirds of the bank's stock must be obtained. While the voluntary liquidation must be so approved under existing law, and while it has been the policy of the Comptroller of the Currency to require that the shareholders also approve the purchase and sale agreement, it is believed that there should be a statutory requirement of such approval. The Comptroller of the Currency may waive this requirement for shareholder approval if an emergency exists." H.R. Rep. No. 694, 86th Cong., 1st Sess. 3 (1959).

The corresponding report of the Senate Committee on Banking and Currency to the Senate explained the purpose of the new requirement respecting shareholder approval as follows: "Section 15 would amend Revised Statutes, section 5220 (12 U.S.C. 181), relating to the liquidation of national banks, by adding a requirement that shareholders must approve a purchase and sale agreement if any part of the liquidation is to be accomplished by the sale of any of the bank's assets, but excusing the need for such a vote if in an emergency the Comptroller specifically waives it. Existing law does not require shareholder approval of any agreement the directors may make for a bulk sale of bank assets to another bank as a preliminary step to voting the selling bank into voluntary liquidation. This new provision would provide for a shareholder vote in such cases, except in emergencies. Substantially the same amendment was included in the Financial Institutions Act: Title 1, section 58(a) (p. 50)."[6] S. Rep. No. 730, 86th Cong., 1st Sess. 4-5 (1959).

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[6] For reasons not pertinent here the Financial Institutions Act did not become law. Section 58(a) of Title I of the act pro-

The reason for the exception in the case of emergencies does not clearly appear but it is sufficiently obvi-

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vided as follows: "Any national banking association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock. If the liquidation is to be effected in whole or in part through the sale of its assets to and the assumption of its deposit liabilities by another bank, the purchase and sale agreement must also be approved by its shareholders owning two-thirds of its stock unless an emergency exists and the Comptroller specifically waves [*sic*] such requirement for shareholder approval."

Section 58(a) was based at least in part on the following recommendation made by the Comptroller of the Currency, Mr. Gidney, to the Senate Committee on Banking and Currency: "It is recommended that section 5220 of the Revised Statutes [12 U.S.C.A. §181] be amended to require approval by shareholders owning two-thirds of the stock of any national bank before the assets of said bank may be sold to another banking institution in carrying out the liquidation of the selling bank." The reason for the suggestion was that "section 5220 now requires shareholder approval of any vote to place a national bank in voluntary liquidation but does not require shareholder approval of any agreement entered into by the directors relating to a bulk sale of the bank's assets to another banking institution as a preliminary step to voting the bank into voluntary liquidation. In order to permit shareholders to have a vote on the vital question of selling the bank's assets it is believed the statute should be amended so as to require preliminary approval of the sale by shareholders owning two-thirds of the stock of the national bank." Hearings to Consider the Legislative Recommendations of the Federal Supervisory Agencies Before the Senate Committee on Banking and Currency, 84th Cong., 2nd Sess., pt. 1, at 44 (1956). See Hearings on Financial Institutions Act of 1957 Before a Subcommittee of the Senate Committee on Banking and Currency, 85th Cong., 1st Sess., pt. 2, at 457 (1957).

Before the House Committee on Banking and Currency, the Comptroller stated: "Under present law shareholder's approval is not required for a bulk sale of the bank's assets to another bank as a preliminary step to placing the bank into voluntary liquidation.

ous that its *raison d'etre* was that for practical considerations it was thought desirable that the shareholder vote be dispensed with in urgent circumstances.[7]

It is plain from the face of the statute and the report to the House of Representatives that in order to effect a voluntary liquidation, Section 181 contemplates two distinct shareholders votes in the circumstance at bar: one

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"The Comptroller has insisted that shareholders vote on and approve such transactions, but we believe the shareholders should have a statutory right to vote on the vital question of selling the bank's assets." Hearings on Financial Institutions Act of 1957 Before the House Committee on Banking and Currency, 85th Cong., 1st Sess., pt. 1, at 162 (1957).

[7] Speaking before a Subcommittee of the House Committee on Banking and Currency, Mr. Wolcott, the Chairman of the Federal Deposit Insurance Corporation, stated: "Section 16 of H.R. 6093 [later superseded by H.R. 8159 which was subsequently enacted as the 1959 amendment] would require approval by shareholders owning two-thirds of the stock of any national bank if its 'liquidation is to be effected in whole or in part through the sale of its assets to and the assumption of its deposit liabilities by another bank,' unless an emergency exists and the Comptroller specifically waives such requirement for shareholder approval.

"In *City National Bank of Huron, S.D. v. Fuller*, (52 F. (2d) 870 (8th Cir., 1931)), it was said that the directors may sell all the assets of a national bank where it is necessary for the protection of creditors in view of its approaching insolvency.

"The proposed authority of the Comptroller to waive the requirement for shareholder approval is necessary and proper, we believe, to protect the Corporation from delays in rendering financial assistance to national banks in emergency situations. However, it is suggested that the words 'sale of its assets' be changed to the words 'sale of any of its assets' to avoid any implication that such provision is only applicable to the sale of all its assets." Hearings on H.R. 6092 and H.R. 6093 Before Subcommittee No. 2 of the House Committee on Banking and Currency, 86th Cong., 1st Sess. 39 (1959).

respecting voluntary liquidation as such and the other concerning approval of the purchase and sale agreement. The Comptroller's power to waive shareholder approval in appropriate circumstances extends to this latter vote requirement. The Report to the Senate makes clear a point somewhat equivocal in the House Report, that it was contemplated that liquidation contracts could be entered into without a prior shareholder approval of liquidation. Indeed this practice was viewed as being sanctioned under pre-existing law and constituted the situation at which the new legislation was directed.

In view of this background we do not see how it can be reasonably argued that the instant contract was invalid either because it was executed prior to shareholder approval of liquidation or what reduces itself to the same thing, because the liquidation was not subsequently approved by the necessary two-thirds vote of the shareholders.[8] Assuming for purposes of discussion that the Comptroller's action in waiving shareholder approval of the contract of sale was valid, an issue which we will consider at a subsequent point in this opinion, the executed contract was not open to valid attack. Section 181 when read in the light of its legislative history assumes a situation in which a board of directors first negotiates a purchase and sale agreement in contemplation of a voluntary liquidation. In the usual case a vote of the shareholders owning two-thirds of the stock will be necessary in order to validate the agreement. In an emergency situation in which the Comptroller validly waives the right of

[8] Of course a particular contract for the sale of assets does not come at all within the purview of the 1959 amendment unless it is made in contemplation of liquidation.

shareholder approval of the agreement, the validity of the contract does not depend upon shareholder approval. In either case it is still open to the shareholders by subsequent vote to determine whether they desire a completion of the voluntary liquidation of a continuation of the corporate existence.

The 1959 statute resulted from a belief on the part of Congress that shareholders to that time had not had effective control over the execution of bulk sale agreements made in contemplation of liquidation. What seems implicit in this view is a conclusion to the effect that the validity of such an agreement in no way related to or was dependent upon the subsequent receipt of the necessary two-thirds vote of approval of liquidation. If the view of Congress had been to the contrary in this regard, no additional protection of shareholders would have been required inasmuch as dissenting shareholders could just as effectively express their disapproval of a particular contract by means of their vote as to liquidation. Similarly, on this assumption the Comptroller's power of waiver would be substantially meaningless. The validity of purchase and sale contracts entered into in times of emergency with shareholder approval waived, would depend on a subsequent vote in favor of liquidation. Shareholders considering a particular offer undesirable could effectively "kill" the contract by means of their liquidation vote. No better example of this provided than by the facts of the case at bar. The essential relief requested by the appellants was a declaration of invalidity of the Exeter-Wyoming contract, an injunction forbidding the parties from taking any action under the contract, and an order directing the officers and directors of the Exeter bank to

submit to the shareholders for approval all offers presently existing or hereafter obtained for the purchase of the bank's assets. We conclude that the appellants' position is without merit.

Appellants finally contend that the Exeter-Wyoming contract was invalid because the Comptroller was without power to waive the right of shareholder approval as to it in the present circumstance. The issue posed in the instant context relates to whether or not an emergency existed respecting the Exeter bank within the purview of Section 181. As previously indicated the court below adopted the view that all matters involving the judgment of the Comptroller in the case at bar were within his sole and exclusive discretion, non-reviewable by the court. The complaint was therefore dismissed as against the Comptroller. For reasons stated hereinafter, we are of the view that the court below erred in this regard insofar as its order related to and precluded review respecting the Comptroller's determination of the existence of an emergency. The necessity, we think, for some type or measure of judicial review concerning this determination indicates that the Comptroller must be treated as a necessary if not an indispensable party within the meaning of Rule 19, Fed. R. Civ. P., 28 U.S.C., in the instant case.[9]

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[9] Rule 19 provides in pertinent part: "(a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

"(b) Effect of Failure To Join. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been

The 1959 amendment to Section 181 provides that purchase and sale agreements must be approved by the shareholders owning two-thirds of the bank's stock "unless an emergency exists and the Comptroller of the Currency specifically waives such requirement for shareholder approval." It will be noted that the emergency phrase and the waiver phrase are conjoined. The language employed with respect to emergency is sharply distinguishable from that evidence in other sections of the national banking statute involving decisions of the Comptroller such as those concerning appointment of a conservator and termination of a conservatorship. Thus Section 203, 12 U.S.C.A., reads in pertinent part: "*Whenever he shall deem it necessary* in order to conserve the assets of any bank for the benefit of the depositors and other creditors thereof, the Comptroller of the Currency may appoint a conservator for such bank and require of him such bond and security *as the Comptroller of the Currency deems proper.* (Emphasis added.)" Section 205, U.S.C.A., quoted *supra,* concerning termination of a conservatorship contains substantially similar language. See generally 1 Davis, Ad-

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made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons."

The distinction between indispensable and necessary parties is immaterial for purposes of the issues raised on this appeal.

ministrative Law, §4.04 (1958). We cannot consider the differing language in Section 181 to have been employed inadvertently, particularly in view of the fact that the moving force in the enactment of the amendment was a desire on the part of Congress to increase protection for shareholders. To construe the statute as entrusting to the Comptroller a non-reviewable discretion in this area would have the opposite effect, e.g., that of decreasing the safeguards available to shareholders under pre-existing law, in at least one basic respect.[10] We conclude that the Comptroller's determination respecting the existence of an emergency is reviewable and that remand is necessary for consideration of the question in the first instance by the court below.

The sole issue that remains for discussion is the test to be applied by the court below on remand. While we have concluded that the Comptrollers' determination respecting the existence of an emergency is reviewable,

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[10] The broad statement contained in the report of the Senate Committee on Banking and Currency set out in the opinion *supra*, that "existing law does not require shareholder approval of any agreement the directors may make for a bulk sale of bank assets to another bank as a preliminary step to voting the selling bank into voluntary liquidation" is a literal overstatement respecting the pertinent law. Under pre-existing law shareholders were empowered to challenge such agreements as not having been necessary for the protection of creditors. See, e.g., Wannamaker v. Edisto Nat'l Bank, 62 F. 2d 696 (4 Cir., 1933); City Nat'l Bank of Huron v. Fuller, 52 F. 2d 870 (8 Cir., 1931). See also the statement set out in note 6, *supra*. And of course an agreement can always be attacked as being the product of fraud or bad faith. The legislative history of the 1959 amendment leaves no doubt that it was not contemplated that the new enactment effected or was to effect a significant substantive change in the law.

nevertheless it is manifest that the Comptroller is charged with the fundamental power of decision on this question. The standard to be applied is not whether an emergency in fact existed but whether a reasonable man on the basis of facts of which he was aware or should have been aware, could have reasonably concluded that an emergency existed. All matter relevant to a proper consideration of this question will be of course admissible into evidence. The extent if any to which it is proper to specifically define or give some semblance of meaning to the term "emergency" as employed in Section 181, we leave initially to the judgment of the court below after consideration of the facts and the legal arguments presented. In so holding we believe that we have given due consideration to the authorities cited on the brief of the Comptroller and strongly relied on by his counsel in oral argument. We do not find these cases to be apposite here. To so hold would, we think, be contrary to the intent of Congress. See, again, notes 6, 7, and 10, *supra,* and the text of this opinion to which they are cited.

We have considered the other points raised by the parties and are of the view that none requires discussion.

The order of July 2, 1962, dismissing the complaint as to the Comptroller will be reversed, as also will be the order of July 12, 1963, dismissing the complaint as to the other defendants. The cause will be remanded with the direction to reinstate the Comptroller as a party defendant and to reinstate the complaint as to all the defendants and to take further proceedings consistent with this opinion. Costs will be taxed in favor of the plaintiffs-appellants and against all the defendants-appellees except the Comptroller.

A True Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit.

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil Action No. 7591

Albert J. Minichello et al.,

Plaintiffs

vs.

James J. Saxon, Comptroller of Currency of the United States of America et al.,

Defendants

MEMORANDUM

This derivative stockholders' action is presently before this Court on Mandate from the Court of Appeals. In accordance with the Mandate, this Court by Order of July 14, 1965, reinstated the Comptroller as a party defendant and also reinstated the Complaint as to all defendants.

The Court of Appeals, in further disagreement with this Court, concluded that the Comptroller's determination respecting the existence of an emergency is reviewable and accordingly remand was necessary for consideration of the question in the first instance by this Court.

The Court of Appeals said, inter alia:

> "The sole issue that remains for discussion is the test to be applied by the court below on remand. While we have concluded that the Comptroller's determination respecting the existence of an emergency is reviewable, nevertheless it is manifest that the Comptroller is charged with the fundamental power of decision on this question. The standard to be applied is not whether an emergency in fact existed but whether a reasonable man on the basis of facts of which he was aware or should have been aware, could have reasonably concluded that an emergency existed. All matter relevant to a proper consideration of this question will be of course admissible into evidence. The extent if any to which it is proper to specifically define or give some semblance of meaning to the term 'emergency' as employed in Section 181, we leave initially to the judgment of the court below after consideration of the facts and the legal arguments presented. * * *"

In the light of the opinion of the Court of Appeals, we are here charged with the duty of reviewing the action of the Comptroller of the Currency taken on February 26, 1962, with relation to the First National Bank of Exeter when he stated, inter alia, "I have determined that an emergency exists, * * *" We are not required to deter-

mine whether or not an emergency did in fact exist at that time at the Exeter Bank, but whether a reasonable man on the basis of facts of which he was aware or should have been aware, could have reasonably concluded that an emergency existed. "All matter relevant to a proper consideration of this question will be of course admissible into evidence."

In accordance with the said Mandate, the Court set Monday, January 9, 1967, at 10:00 o'clock a.m., at the United States Courthouse, Lewisburg, Pennsylvania, as the time and place to take testimony as directed by said Mandate.

At the hearing, plaintiffs moved to incorporate into the record the testimony taken before the Court in the first hearing, which began June 24, 1963, and various exhibits. Plaintiffs called the attention of the Court to the fact that George Daileda, former Cashier of the Exeter Bank, was deceased and that August Lippi, Chairman of the Board of said bank, had been convicted as to some of the defalcations at this bank. Plaintiffs then rested.

At this point, defendants called Marshall Abrahamson who identified himself as Chief National Bank Examiner in the employ of the Comptroller of the Currency during the month of February, 1962. On questioning by the United States Attorney who was acting by agreement for all defendants, Mr. Abrahamson testified at considerable length and was cross-examined by counsel for plaintiffs.

Mr. Abrahamson's testimony may be condensed as follows: First National Bank of Exeter was under the

jurisdiction of Mr. Abrahamson as a part of the Third Federal Reserve District whose headquarters were in Philadelphia, Pennsylvania. On January 29, 1962, Abrahamson received a call from Ettore J. Lippi, President of the Exeter Bank, that a defalcation existed occasioned by Daileda, the Cashier. Pursuant to that telephoned conversation, Abrahamson in his capacity as Chief National Bank Examiner immediately telephoned Examiner Talarsky and sent him to the bank to determine the extent of the defalcation. In addition, Abrahamson arranged to be at the bank the next morning, January 30. With the aid of Talarsky and a group of assistants from the area, Abrahamson practically conducted another investigation of the bank in an effort to determine the exact condition of the bank because by that time they knew the defalcation was large, actually in excess of $200,000.00, and that it probably impaired the capital. At that time the capital structure was about $350,000.00.

Abrahamson was at the bank off and on for the next few weeks during which time the examination of the bank continued without interruption. During all of this time the shortage was increasing daily and by February 26, 1962, it was in the neighborhood of $450,000.00 or $460,000.00. Each new lead would develop further losses. At no time were the examiners satisfied that they had determined the actual extent of the defalcation. The examiners found that the majority of the losses were liabilities not shown on the books of the bank, but rather that funds had been abstracted and the records had been withdrawn by Daileda, so that when the bank's depositors were contacted it was discovered that additional deposits were not shown on the bank books.

The examiners knew there was in existence a primary bond of $200,000.00 and a $1,000,000.00 excess bond. They also knew that the excess bond had not been authorized by the Board of Directors; that it was obtained by the Cashier, Daileda, without the knowledge of the Board; that he could not pay for the bond in the usual way by a Cashier's check charged to expense for the reason that in that event the Board would have knowledge of it; that Daileda falsified the records and paid for it with a Cashier's check with a duplicate number and it never did appear in the expense account.

At this point the defendant offered in evidence two letters from Scarborough and Company Insurance Counselors of Chicago, Illinois, to the Exeter Bank. The one letter stated that an investigation was being made by the Underwriters, that the Underwriters admitted no liability under said bond and expressly denied liability thereunder. The second letter stated that since there was a question as to refund due and owing, the funds had been placed in escrow pending advice as to whom refund should be made.

Abrahamson continued that after taking the capital structure of the bank and adding to it the $200,000.00 primary bond and deducting therefrom the known loss and the paper felt to be reasonably uncollectible, there remained slightly less than $100,000.00 funds.

As of February 26, 1962, as the result of the examination, and the fact the examiners could not say with any assurance that the million dollar bond would be paid in the light of the denial of liability, Abrahamson con-

cluded that an emergency existed.[1] He was in constant communication with the Comptroller by telephone during the period from January 30, until the conservatorship was removed. These telephone reports to the Comptroller were almost daily, the frequency varying with the information which was to be submitted.

There were some large withdrawals, one by a director amounting to between $160,000.00 and $167,000.00, which gave them concern and this was one of the factors leading up to placing the bank into conservatorship. In addition, Abrahamson reported to the Comptroller the actions of the Lippi group which constituted a majority of the Board and of this the Comptroller was fully advised. Abrahamson endeavored to have the Lippi group resign from the Board, but they refused. He testified that he certainly considered that an emergency existed at the bank and he reported this fact to the Comptroller.

Abrahamson repeated that on telephonic inquiry from the Comptroller as to his idea or recommendations as to the existence of an emergency, he replied that in his opinion there was an emergency.

On cross-examination, he testified: "that continued withdrawal of good assets, cash and available funds, to meet withdrawal of deposits could only continue—they would continue and then they would result in a condition existing whereby the bank would have slow assets or uncollectible assets to meet the remaining deposit liabilities. And that's what gave the Comptroller concern." (N.T.

[1] As to Daileda's fraud vitiating the bond and precluding any recovery thereon, see Gordon v. Continental Casualty Company, 319 Pa. 555 (1935).

pp. 45-46).[2] Abrahamson also testified that although there had been a number of very substantial withdrawals, there had not been a run on the bank in the generally accepted meaning of that term and that at no time including the time the conservator was in power, did the bank lose the confidence of the banking public in Exeter. Then on further cross-examination, there appeared the following:

"By Mr. Falvello:

"Q. Mr. Abrahamson, while the Conservator was in control of the bank there was no emergency was there?

"A. Oh, yes. The emergency continues. The mere fact that the Conservator is appointed, he merely conserves the assets. He only permitted a percentage withdrawal of deposits within a limitation that he knew would not wreck the bank or cause its insolvency. But the emergency had to continue during this period, or otherwise the Conservatorship would have been terminated sooner; because when the emergency is over, there is no need for a Conservator. But you have to say during his entire tenure that there was or is an emergency. He wouldn't be in there otherwise.

* * * * * * * *

"A. Well, I made my recommendation to the Comptroller fearful that this bank could become insolvent; that this is an emergency. The emergency as we are using it here, means that something could happen to this bank that would cause it to become in-

[2] Unless otherwise designated, "N.T." refers to Notes of Testimony of Hearing of January 9, 1967.

solvent and force its closing. And we merely took the steps by naming Conservator to tide this thing over until the Board took some action to replenish the capital funds of the bank or until such action that we knew that this million dollar excess bond would be covered, or until the Lippi group would divest themselves because the management was highly questionable. And these all are points in the emergency." (N.T. pp. 50-51).

Among the exhibits offered in evidence by plaintiffs at the hearing of January 9, 1967, were No. 23, being the audit and verification of accounts of the Exeter Bank as of January 31, 1962, dated April 24, 1962; and No. 22, being the settlement agreement on the excess bond, dated April 24, 1962, neither of which were in existence when the Comptroller exercised his judgment.

The following uncontroverted facts were developed at the hearings:

1. The First National Bank of Exeter was a small community bank. Its capital stock was $75,000.00, it had surplus of $225,000.00 and undivided profits of $51,000.00. (N.T. p. 17).

2. The defalcation was discovered on January 29, 1962. (N.T. p. 13).

3. Marshall Abrahamson, Chief National Bank Examiner, with forty years experience, sent Mr. Talarsky, a National Bank Examiner, to the Exeter Bank on January 29, 1962. (N.T. pp. 14, 36).

4. Mr. Abrahamson arrived at the Exeter Bank on January 30, 1962, and with a team of examiners began an investigation of the bank. (N.T. pp. 14, 15).

5. On January 30, 1962, the shortage amounted to $200,000.00 and grew steadily until February 26, 1962, when it had reached a figure between $450,000.00 and $460,000.00. (N.T. p. 18).

6. Between January 30, 1962, and February 26, 1962, Mr. Abrahamson was in constant communication with the Comptroller and reported all facts as they were discovered. (N.T. pp. 32, 33).

7. Mr. Santarelli, a member of the Board of Directors of the Exeter Bank, withdrew his accounts amounting to between $160,000.00 and $167,000.00 prior to the appointment of the conservator. (N.T. pp. 33, 45).

8. Other depositors closed their accounts during this period. (N.T. p. 34).

9. The examination as of February 26, 1962, indicated that there were savings accounts which were not insured by Federal Deposit Insurance Corporation in the amount of approximately $170,000.00. (N.T. p. 36).

10. The bank had Fidelity Surety bonds covering its officers and employees in the sum of $200,000.00. (N.T. p. 22).

11. There was an excess bond in the sum of $1,000,000.00 on which the company had formally denied liability by letter dated February 19, 1962. (Defendants' Exhibit No. 1).

12. The examination by the bank examiners revealed that there were a number of loans on the bank books which were considered doubtful and substandard. (N.T. p. 28).

13. On or about January 30, 1962, the Chairman of the Board of Directors and the former Cashier of the bank were both arrested by agents of the Federal Bureau of Investigation and charged with violations of Title 18 U.S.C. Sections 656, 1005 and 2 in connection with the defalcation at the bank. (N.T. p. 8).

14. The August Lippi group was in control of the Board of Directors and had majority control of the Exeter Bank stock. (N.T. pp. 34, 35).

15. The Comptroller was not satisfied with the Lippi group management and constantly requested them to get off the Board and divest themselves of their stock, but they refused. (N.T. pp. 34, 54).

16. In addition to August Lippi, his son, Ettore Lippi, was a Director and President of the Bank, and his son, John Lippi, was a Director. (N.T. p. 28).

17. On February 26, 1962, the financial picture of the First National Bank of Exeter was as follows: Assets—capital stock $75,000.00, surplus $225,000.00, undivided profits $51,000.00, Fidelity Bonds $200,000.00, making a total of $551,000.00. The known defalcation was $460,000.00 and in addition, there were savings accounts not insured by the Federal Deposit Insurance Corporation in the amount of $170,000.00 and there were numerous doubtful and substandard loans.

18. On February 19, 1962, the Comptroller appointed a conservator for the bank. (N.T. p. 41 of Hearing of June 24, 1963).

19. By letters dated February 19, 1962, the Bonding Company notified the Exeter Bank that it disclaimed lia-

bility on the excess bond and that it was seeking information as to the person to whom it should return the purported premium payments. (Defendants' Exhibit Nos. 1 and 2).

20. It was impossible for anyone to determine what amount the ultimate shortage would reach. (N.T. pp. 21, 22 and N.T. pp. 77, 78 of Hearing of June 24, 1963).

21. The shortage continued to grow after the conservatorship was terminated. (N.T. p. 39).

22. During this period, the shortage was not being stated on the bank's books of condition and did not have any effect on the bank's published condition. (N.T. p. 44).

23. Deposit accounts in excess of $10,000.00 totaled approximately $170,000.00 which were not protected by Federal Deposit Insurance. (N.T. pp. 35, 36).

24. Marshall Abrahamson, the Chief National Bank Examiner in charge of the investigation of the Exeter Bank, reported to the Comptroller of the Currency that there only remained slightly less than $100,000.00 in capital funds in the Exeter Bank, that the shortage was continuing to grow, that he was fearful the bank might become insolvent, and that in his opinion, an emergency existed.[3] (N.T. pp. 29-32, 36-38, 51).

Having in mind the observation of the Court of Appeals that "All matter relevant to a proper consideration of this question [whether a reasonable man on the basis

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[3] It must be remembered that in addition to the facts which the Comptroller knew he had to assess the possibilities that could occur before exercising his judgment.

of facts of which he was aware or should have been aware could have reasonably concluded that an emergency existed] will be of course admissible into evidence", the utmost freedom was accorded the parties in presenting their views. Plaintiffs offered no testimony but introduced a few exhibits and the record of the hearing of June 24, 1963. The defendants produced the Chief National Bank Examiner who was appointed by the Comptroller to conduct the examination of the bank.

The following excerpt from letter of April 11, 1962 (plaintiffs' Exhibit No. 18) from the Comptroller to the Chairman of the Committee on Banking and Currency, House of Representatives, Washington, D. C., is here quoted to indicate the thinking of the Comptroller during the developments herein set forth for what light it may throw on the question as to whether a reasonable man could be justified in concluding that an emergency existed at the Exeter Bank:

> "As an audit of the bank progressed the amount of the defalcation continued to rise to the point where it was obvious that the bank could not be permitted to continue operating although there was doubt as to whether it could be held to be technically insolvent. In light of these facts, plus the failure of the persons involved to work out a satisfactory sale or reorganization of the bank, a serious question as to the liability by the insurer on the bank's umbrella bond, the fact that a receiver may be appointed by the Comptroller only if he is satisfied that the bank is insolvent, etc., there was no alternative but to seek some satisfactory means of conserving the assets of the bank until the full amount of defalcation could be ascer-

tained, the liability or lack of liability of the bonding company could be better established, and there could be determined whether a prompt sale or reorganization of the bank could be accomplished.

"There was reason to believe that the bank could be sold. In spite of its difficulties the bank at no time lost the confidence of the banking public in Exeter, and there was no run nor heavy withdrawals of deposits. A number of sound and well managed banks in the area had expressed an interest in acquiring the bank. Such an acquisition would, of course, insure the continuation of sound, adequate banking service in the community with all deposits immediately available and a minimum of harmful publicity. This would clearly be preferable to receivership even if I had legal authority to place the bank in receivership. The appropriate and perhaps only way the depositors could be protected until the bank could be sold was through a conservatorship."

I feel that the facts of this case as developed at the hearing fully meet the criteria outlined by the Court of Appeals for determining that an emergency existed.

It seems clear that an emergency exists when imminent danger of insolvency requires one to safeguard the assets in order to prevent the sacrifice of assets when under existing circumstances the value of the assets could only be preserved by prompt action. Insolvency is not the test for the application of 12 U.S.C. §181.

Basically, the Comptroller is charged with the fundamental power of decision on the question of an emergency.

In 29A C.J.S., Emergency, p. 140, it is stated: "It has been said that it is difficult to define an emergency, and that the term is not the subject of an easy or exact definition."

The Court of Appeals said, inter alia: "The extent if any to which it is proper to specifically define or give some semblance of meaning to the term 'emergency' as employed in Section 181, we leave initially to the judgment of the court below after consideration of the facts and the legal arguments presented."

That part of Section 181 applicable to the instant situation provides as follows:

> "Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock. If the liquidation is to be effected in whole or in part through the sale of any of its assets to and the assumption of its deposit liabilities by another bank, the purchase and sale agreement must also be approved by its shareholders owning two-thirds of its stock unless an emergency exists and the Comptroller of the Currency specifically waives such requirement for shareholder approval:"

The term "emergency" has been variously defined as follows:

> "Any event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency:" Cyclopedic Law Dictionary, 3rd Ed. (1940), p. 380.

> "An unforeseen combination of circumstances which calls for immediate action:" Webster's Collegiate Dictionary, 5th Ed. (1943), p. 326.

It seems clear that the term "emergency" as used in Section 181 providing for the voluntary liquidation of a bank means a combination of circumstances less than an insolvency but sufficiently serious to require swift action to negotiate a sale within the terms of Section 181. It would appear further that Section 181 which requires the purchasing bank to assume the deposit liabilities of the selling bank was designed to permit a troubled bank, heading towards a possible insolvency and being in the midst of an emergency, to move swiftly through its directors, to sell its assets to another bank which would give the selling bank's depositors one hundred per cent protection on all deposits, regardless of size, vis-a-vis, in insolvency and with the appointment of a receiver under Section 191, deposits up to $10,000.00 only would have been protected by Federal Deposit Insurance Corporation.

After a thorough consideration of all of the facts and legal arguments presented herein, and having in mind that examinations of this bank over a twenty-five year period had failed to disclose any evidence of the defalcations participated in by the bank's Chairman of the Board and its Cashier and that the defalcations remained secret until the Cashier's confession in January, 1962; that the Chief National Bank Examiner, appointed by the Comptroller to conduct the examination, made almost daily reports concerning the constantly increasing shortage; and finally that the bonding company's (Security Mutual Casualty Company) disclaimer of liability on the excess bond convinced the Comptroller as a reasonable man that he would have to eliminate the excess bond as a possible asset when he made his assessment of the bank's financial condition on February 26, 1962, the day of the sale, a rea-

sonable man should have concluded that an emergency existed.[4]

I conclude that on the basis of facts herein stated, all of which were uncontroverted and concerning which the Comptroller was or should have been aware, the Comptroller could have reasonably concluded that an emergency existed at the First National Bank of Exeter, and that accordingly the Comptroller was beyond question justified in the decision he made under 12 U.S.C. §181 to waive the requirement of shareholders' approval of the sale to Wyoming National Bank of Wilkes-Barre. Had it not been for the firm and decisive action of the Comptroller, which I have found was fully justified, it is entirely possible that the situation as it existed on February 26, 1962, might have deteriorated and resulted in a very substantial loss to the depositors, other creditors and shareholders of the First National Bank of Exeter.

---

[4] At the hearing on January 9, 1967, plaintiff offered in evidence "Release and Agreement of Indemnification" between Wyoming National Bank of Wilkes-Barre, Wilkes-Barre, Pennsylvania, and Security Mutual Casualty Company, Chicago, Illinois, dated November 7, 1962. This paper sets forth that under date of February 26, 1962, First National Bank of Exeter transferred all of its assets, including Excess Fidelity Policy dated December 15, 1959, issued by Security to Exeter; that Wyoming had made demand on Security for payment of certain claims and filed proof of loss in the sum of $259,710.22; that on the agreement of Wyoming to indemnify Security for any losses Security might suffer by reason of making payment to Wyoming, it was agreed that Security should pay and Wyoming should accept the sum of $129,855.11 in full settlement of the claim. It should here be noted that it was on February 26, 1962, that the Comptroller said, "I have determined that an emergency exists", the instant release is dated November 7, 1962. When the Comptroller made his decision, liability was completely denied.

Accordingly, verdict will be entered for the defendants.

(s) Frederick V. Follmer,
United States District Judge.

ORDER

Now, April 7, 1967, in accordance with Memorandum filed this day. It is Ordered, Adjudged and Decreed that judgment in the above case be and it hereby is entered in favor of the defendants.

(s) Frederick V. Follmer,
United States District Judge.

Appendix

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 16669

ALBERT J. MINICHELLO, NICHOLAS MAURIELLO, on a Derivative Action on Behalf of Themselves and on Behalf of Other Stockholders of the First National Bank of Exeter Similarly Situated, Incorrectly Described in the Summons and Complaint as ALBERT J. MINICHELLO, NICHOLAS MAURIELLO and YGNATZ YUCHNIS,

Appellants,

v.

WILLIAM B. CAMP, Comptroller of Currency for the UNITED STATES OF AMERICA, FIRST NATIONAL BANK OF EXETER, WYOMING NATIONAL BANK OF WILKES-BARRE, AUGUST J. LIPPI, ETTORE LIPPI, JOHN LIPPI, JOHN B. CAMPBELL, GEORGE MAFFEI and HAROLD REICH

Appeal from the United States District Court for the Middle District of Pennsylvania

Argued April 19, 1968

Before Biggs, McLaughlin and Freedman, *Circuit Judges*

Appendix

OPINION OF THE COURT

(Filed May 9, 1968)

PER CURIAM:

The appellants Minichello and Mauriello appeal from a judgment of the court below entered in favor of all of the appellees. The relevant facts are fully stated in Minichello v. Saxon, 337 F. 2d 75 (3 Cir. 1964). Therefore only the following need be set out here. On or about January 29, 1962, a defalcation of approximately $200,000 was discovered at the First National Bank of Exeter. On February 19, 1962, the Comptroller of the Currency, pursuant to Section 203, 12 U.S.C.A., appointed a conservator for the Exeter bank. On February 26, 1962, the Comptroller terminated the conservatorship in order to allow the Board of Directors of the Exeter bank to effect a sale of the assets of the bank. At the same time the Comptroller found that an "emergency" existed at the bank and pursuant to 12 U.S.C.A. §181 waived the requirement of shareholders' approval of the purchase and sale agreement. The sale was subsequently consummated. Minichello and Mauriello as minority shareholders of the Exeter bank brought a shareholders' derivative suit to have the sale set aside and have other relief granted. The court below dismissed the complaint against all of the appellees, the dismissal of the cause against the Comptroller being on the ground that the Comptroller's action was not judicially reviewable. This court reversed that judgment and remanded the suit to the court below with directions to reinstate the complaint as to all the appellees. Minichello v. Saxon, 337 F. 2d 75 (1964), cert. denied, 380 U.S. 952 (1965). As noted the court below, upon remand, after hearing, entered judgment in favor of the appellees.

The primary issue before the court below and before this court on the present appeal is whether the Comptroller could have reasonably found that an "emergency" existed at the Exeter bank on February 26, 1962 which would justify his waiving shareholder approval of the sale of the assets of the bank. An examination of the record demonstrates that there was ample evidence to support the conclusion of the court below that the Comptroller could have reasonably found that an emergency existed at the time stated. Other issues raised by the appellants were either disposed of in our original decision in this case or do not require discussion.

The judgment will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix

STATUTES INVOLVED

Title 12, U.S.C.A. Banks and Banking:

VOLUNTARY DISSOLUTION

§181. *Voluntary dissolution; appointment and removal of liquidating agent or committee; examination*

Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock. If the liquidation is to be effected in whole or in part through the sale of any of its assets to and the assumption of its deposit liabilities by another bank, the purchase and sale agreement must also be approved by its shareholders owning two-thirds of its stock unless an emergency exists and the Comptroller of the Currency specifically waives such requirement for shareholder approval.

The shareholders shall designate one or more persons to act as liquidating agent or committee, who shall conduct the liquidation in accordance with law and under the supervision of the board of directors, who shall require a suitable bond to be given by said agent or committee. The liquidating agent or committee shall render annual reports to the Comptroller of the Currency on the 31st day of December of each year showing the progress of said liquidation until the same is completed. The liquidating agent or committee shall also make an annual report to a meeting of the shareholders to be held on the date fixed in the articles of association for the annual meeting, at which meeting the shareholders may, if they see fit, by a vote representing a majority of the entire stock of the bank, remove the liquidating agent or committee and appoint

one or more others in place thereof. A special meeting of the shareholders may be called at any time in the same manner as if the bank continued an active bank and at said meeting the shareholders may, by vote of the majority of the stock, remove the liquidating agent or committee. The Comptroller of the Currency is authorized to have an examination made at any time into the affairs of the liquidating bank until the claims of all creditors have been satisfied, and the expense of making such examinations shall be assessed against such bank in the same manner as in the case of examinations made pursuant to section 481-485 of this title. As amended Sept. 8, 1959, Pub. L. 86—230, §15, 73 Stat. 458.

(12 USCA, Banks and Banking, 1964 Cumulative Annual Pocket Part, p. 59)

§192. *Default in payment of circulating notes*

On becoming satisfied, as specified in sections 131 and 132 of this title, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct. Such receiver shall pay over all moneys so made to the Treasurer of the United States, sub-

ject to the order of the comptroller, and also make report to the comptroller of all his acts and proceedings.

Provided, That the comptroller may, if he deems proper deposit any of the money so made in any regular Government depositary, or in any State or national bank either of the city or town in which the insolvent bank was located, or of a city or town as adjacent thereto as practicable; if such deposit is made he shall require the depositary to deposit United States bonds or other satisfactory securities with the Treasurer of the United States for the safekeeping and prompt payment of the money so deposited: *Provided,* That no security in the form of deposit of United States bonds, or otherwise, shall be required in the case of such parts of the deposits as are insured under section 264 of this title. Such depositary shall pay upon such money interest at such rate as the comptroller may prescribe, not less, however, than 2 per centum per annum upon the average monthly amount of such deposits. As amended Sept. 8, 1959, Pub. L. 86—230, §17, 73 Stat. 458.

(12 USCA, Banks and Banking, 1964 Cumulative Annual Pocket Part, p. 6)

NATIONAL BANKS

§203. *Conservator; appointment, powers, and duties, compensation*

Whenever he shall deem it necessary in order to conserve the assets of any bank for the benefit of the depositors and other creditors thereof, the Comptroller of the Currency may appoint a conservator for such bank and require of him such bond and security as the Comptroller of the Currency deems proper. The conservator,

under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such bank, and take such action as may be necessary to conserve the assets of such bank pending further disposition of its business as provided by law. Such conservator shall have all the rights, powers, and privileges now possessed by or hereafter given receivers of insolvent national banks and shall be subject to the obligations and penalties, not inconsistent with the provisions of this subchapter, to which receivers are now or may hereafter become subject. During the time that such conservator remains in possession of such bank, the rights of all parties with respect thereto shall, subject to the other provisions of this subchapter, be the same as if a receiver had been appointed therefor. All expenses of any such conservatorship shall be paid out of the assets of such bank and shall be a lien thereon which shall be prior to any other lien. The conservator shall receive as salary an amount no greater than that paid to employees of the Federal Government for similar services. Mar, 9, 1933, c. 1, §203, 48 Stat. 2.

(12 USCA, Banks and Banking, p. 615)

§205. *Termination of conservatorship; resumption of business*

If the Comptroller of the Currency becomes satisfied that it may safely be done and that it would be in the public interest, he may, in his discretion, terminate the conservatorship and permit such bank to resume the transaction of its business subject to such terms, conditions, restrictions and limitations as he may prescribe. Mar. 9, 1933, c. 1, §205, 48 Stat. 3.

(12 USCA, Banks and Banking, p. 618)

§208. *Provisions as to segregation of deposits inapplicable after termination of conservatorship; notice of termination*

After fifteen days after the affairs of a bank shall have been turned back to its board of directors by the conservator, either with or without a reorganization as provided in section 207 hereof, the provisions of section 206 of this title with respect to the segregation of deposits received while it is in the hands of the conservator and with respect to the use of such deposits to liquidate the indebtedness of such bank shall no longer be effective: *Provided,* That before the conservator shall turn back the affairs of the bank to its board of directors he shall cause to be published in a newspaper published in the city, town or county in which such bank is located, and if no newspaper is published in such city, town or county, in a newspaper to be selected by the Comptroller of the Currency published in the State in which the bank is located, a notice in form approved by the Comptroller, stating the date on which the affairs of the bank will be returned to its board of directors and that the said provisions of section 206 of this title will not be effective after fifteen days after such date; and on the date of the publication of such notice the conservator shall immediately send to every person who is a depositor in such bank under section 206 a copy of such notice by registered mail addressed to the last known address of such person as shown by the records of the bank, and the conservator shall send similar notice in like manner to every person making deposit in such bank under section 206 after the date of such newspaper publication and before the time when the affairs of the

bank are returned to its directors. Mar. 9, 1933, c. 1, §208, 48 Stat. 4.

(12 USCA, Banks and Banking, pp. 621-622)

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In the Supreme Court of the United States

OCTOBER TERM, 1968

ALBERT J. MINICHELLO, ET AL., PETITIONERS

v.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR RESPONDENT CAMP IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 381

ALBERT J. MINICHELLO, ET AL., PETITIONERS

v.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR RESPONDENT CAMP IN OPPOSITION

---

1. Petitioners have challenged the determination by the Comptroller of the Currency that an "emergency" beset the bank of which they were minority shareholders, thereby waiving the requirement that sale of the assets of a national bank is conditioned on approval by two-thirds of the shareholders. 12 U.S.C. 181. Apart from issues that this Court declined to review at an earlier stage in these proceedings, petitioners raise only a question of the sufficiency of the evidence, which is inappropriate for further review.

In 1964, the court of appeals rejected the principal legal contentions renewed in the present petition, finding unsound petitioners' contention that the directors were incompetent to contract for the sale of the First National Bank of Exeter to the Wyoming National Bank because at the time the sale was agreed upon the Exeter Bank was in conservatorship (Pet. App. 86-88; 337 F. 2d 75). The court also, however—disagreeing both with the Comptroller's position that his finding of an emergency under 12 U.S.C. 181 is not reviewable, and with petitioners' position that the test is the existence of an actual emergency—remanded the case to the district court for the purpose of determining whether "a reasonable man on the basis of facts of which he [the Comptroller of the Currency] was aware or should have been aware, could have reasonably concluded that an emergency existed," so that his waiver of shareholder approval of the contract would be proper under the statute. On March 29, 1965, this Court denied petitioners' request for review of those holdings. (No. 861, O.T. 1964; 380 U.S. 952).

After trial on remand, the district court found that the Comptroller could reasonably have concluded that an emergency existed when he waived the requirement of shareholder approval of the sale of the bank. In the course of his detailed findings of fact (Pet. App. 100-116), the district judge commented that "[h]ad it not been for the firm and decisive action of the Comptroller, which I have found was fully justified, it is entirely possible that the situation as it existed on February 26, 1962 [the date of the agreement of sale], might have deteriorated and resulted in a very substantial loss to the depositors, other creditors and

shareholders of the First National Bank of Exeter" (Pet. App. 115). The court of appeals affirmed, *per curiam*, ruling that there was ample evidence to support the findings of the district court (Pet. App. 117-119).

2. As shown in our Brief in Opposition to the previous petition (No. 861, O.T. 1964), the legal issues presented in this and the previous petition were correctly decided below, and are not of recurrent significance. There is no conflict of decisions. The lengthy argument in the petition (Pet. 24-68) and the opinions below (Pet. App. 100-119) demonstrate that the only additional issues now presented raise merely factual questions about the degree of exigency under which the Comptroller acted. Since both courts below agreed that the Comptroller acted reasonably in finding that the circumstances warranted emergency action under 12 U.S.C. 181, there is no occasion for review by this Court.[1] See *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1968.

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[1] In opposing the previous petition we also relied on the interlocutory posture of the case. Final resolution of the matter has now underscored the lack of general significance of the issues presented.

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In The

Supreme Court of the United States

For the Third Circuit

October Term, 1968
No. 381

ALBERT J. MINICHELLO and NICHOLAS MAURIELLO on a Derivative Action on Behalf of Themselves and on Behalf of Other Stockholders of the First National Bank of Exeter Similarly Situated,

Petitioners

vs.

WILLIAM B. CAMP, Comptroller of Currency for the United States of America, FIRST NATIONAL BANK OF EXETER, WYOMING NATIONAL BANK OF WILKES-BARRE, AUGUST J. LIPPI, ETTORE LIPPI, JOHN LIPPI, JOHN B. CAMPBELL, GEORGE MAFFEI and HAROLD REICH,

Respondents

PETITION FOR REHEARING OF ORDER OF OCTOBER 14, 1968, ON PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 381

Albert J. Minchello and Nicholas Mauriello, on a Derivative Action on Behalf of Themselves and on Behalf of Other Stockholders of The First National Bank of Exeter, Similarly Situated,

Petitioners

vs.

William B. Camp, Comptroller of Currency for the United States of America, First National Bank of Exeter, Wyoming National Bank of Wilkes-Barre, August J. Lippi, Ettore Lippi, John Lippi, John B. Campbell, George Maffei and Harold Reich,

Respondents.

PETITION FOR REHEARING OF ORDER OF OCTOBER 14, 1968, ON PETITION FOR WRIT OF CERTIORARI

Petitioners, through their attorneys, respectfully submit to the Honorable Justice William J. Brennan this Petition for Rehearing of the Order of your Honorable

Court of October 14, 1968, denying a Writ of Certiorari in the above captioned matter and set forth in support hereof the following substantial grounds available to petitioners, which were not previously presented.

1. The decisions of the lower courts and especially the decisions of the Third Circuit Court of Appeals constitute a violation of the constitutional rights of petitioners in that they are equivalent to an ex post facto law in violation of the Fifth and Fourteenth Amendments of the United States Constitution. Since the Legislature is barred by the ex post facto clause of the Constitution, a court is barred by the due process clause of the Constitution from achieving precisely the same results by judicial construction. Since the rights of petitioners were, at the time of the occurrences involved in this case, clearly and positively established by the then existing Supreme Court decisions, the failure of the Circuit Court to abide by the Supreme Court decisions is, in effect, creating new law after the petitioners' rights have been vested by prior existing law. The Circuit Court failed to abide by the standards of decisional consistency applicable to the facts of this case and the failure of the Circuit Court to abide by prior decisions of the Supreme Court was so unforeseeable as to deprive the petitioners of their rights established by the Constitution. *Bouie vs. City of Columbia, S. C.* (1964), 84 S. Ct. 1697; 378 U.S. 347; 12 L. Ed. 2nd 894. Constitution, Article I, Section 9, Clause 3, "No bill of attainder or ex post facto law shall be passed".

Spreet vs. Morganthau, 116 Fed. 2nd 301, 73 App. D.C. 70;

Sagastivelza vs. Puerto Rico Housing Authority, 195 Fed. 2nd 289;

Personal Finance Company of Braddock vs. United States, 86 Fed. Supp. 779 (D.C.-Delaware 1949);

Stancil vs. United States, 200 Fed. Supp. 36 (D. C. Virginia 1961).

The statute under which the Conservator was appointed (12 U.S.C.A. 203) and the statute which required court approval of the sale of a national bank in conservatorship (12 U.S.C.A. 192) provided due process of law remedies for the protection of property as guaranteed by the Constitution; however, in this case the Comptroller of Currency by completely ignoring the statute and failing to get court approval of the sale in effect repealed the above mentioned statute and thereby exercised legislative function. If the safeguard of due process (whereby a court order is required before a national bank in conservatorship can be sold) can be so easily lost by the acts of an administrative official, the statute is then meaningless and the due process of law is then nonexistent. What good is a protective statute requiring a court order if an administrative official can simply refuse to obtain a court order and have his conduct approved by a district and a circuit court? The case before the court is the same as a statute giving a citizen the right to vote but preventing him from casting his ballot by refusing to let him use the voting machine. Stated differently it is the same as a statute guaranteeing a black person equal employment opportunities and then when the black person applies for a job telling him that even

though that statute is on the books he cannot have a job because he is black. The circuit court's sanctioning of the Comptroller's conduct in this case clearly constitutes denial of due process of law to the petitioners through their great financial loss.

2. The decisions of the lower courts constitute a denial of due process of law to the petitioners as guaranteed to them by the Fifth and Fourteenth Amendments of the Constitution because the decisions constitute an impairment of the obligation of contract rights of the petitioners as set forth in Article 1, Section 10, Clause 1 of the Constitution.

The petition for Certiorari sets forth the opinion of the District Court Judge dated July 23, 1963, indicating that the offer of The First National Bank of Pittston was accepted by the directors of the Exeter Bank. (See pages 77-78 of Petition for Writ of Certiorari.) Despite this, the District Court and the Circuit Court failed to recognize that contract right in violation of petitioners' constitutional rights which guaranteed petitioners that no law would be passed impairing the obligation of contracts. The decision of the lower courts is equivalent to passing a law in violation of this constitutional right.

John McShain vs. District of Columbia, 305 Fed. 2nd 882, 92 U.S. App. D.C. 358;

Holderness vs. Hamilton Fire Insurance of New York, 54 F. Supp. 145, D.C. Florida, 1944.

3. The Statute (12 U.S.C.A. 181) under which the Comptroller acted pertaining to the alleged emergency and waiver of shareholder approval for voluntary liquida-

tion is unconstitutional in that it is unreasonable, arbitrary and capricious and is vague and uncertain and is therefore a denial of due process.

The reference to "an emergency" in 12 U.S.C.A. 181 is so vague and uncertain that men of common intelligence must necessarily guess as to its meaning and differ as to its application, and there is no fixed ascertainable standard for its application, thereby causing the Statute to fail to meet the requirements of due process of law under the Constitution.

Mallatt vs. Ostrander Ry. & Timber Co., D.C. Oregon 1942, 46 F. Supp. 250;

Standard Oil of La. vs. Porterie, D.C. La. 1935, 12 Fed. Supp. 100;

City of New Rochelle vs. Friedman, 78 N.Y.S. 2nd 681, 190 Misc. 654;

Giaccio vs. State of Pennsylvania, 86 Supreme Court 518, 382 U.S. 399, 15 L. Ed. 2nd 447;

Minski vs. U.S., 131 Fed. 2nd 614, 63 Supreme Court 1241, 319 U.S. 463, 87 L. Ed. 1519;

Ward vs. Auctioneers Association of Southern California, 153 P. 2nd 765, 67 Cal. App. 2nd 183.

The Circuit Court's decision stated, "The standard to be applied is not whether an emergency in fact existed but whether a reasonable man on the basis of facts of which he was aware or should have been aware could have reasonably concluded that an emergency existed." (p. 99 petition for Writ of Certiorari). This vague and

uncertain interpretation is proof that the term emergency is vague and uncertain and is also proof that there is no fixed ascertainable standard for the application of the term. The statute specifically stated "... unless an emergency *exists* . . ." (12 U.S.C.A. 181) (Emphasis Added) and despite this language the Circuit Court said, "The standard to be applied is *not* whether an emergency in fact existed . . ." (Emphasis added.) Further the statute did not say anything about the subjective intent of a reasonable man being the deciding factor. In addition the Circuit Court used the term itself to define the term, all of which is clear indication of the vagueness, uncertainly and guesswork involved in the interpretation of the term emergency.

4. The lower courts' decisions abridge the privileges of the petitioners who are citizens of the United States in that their privilege of using the District Court for passing on the legality and propriety of the sale has been denied them, contrary to the constitutional rights of the petitioners. Since by law it was mandatory that the Comptroller get court approval before the sale, the failure to do this is a plain abridgement of the privilege of the petitioners to use the District Court whose approval was necessary.

5. The decisions of the lower courts have denied the petitioners the equal protection of the laws as guaranteed by the Constitution. Since it is mandatory that court approval be obtained before the sale is made and since prior cases have affirmed this rule, the courts in those prior cases have protected the parties therein and yet in this case the lower courts have failed to protect the petitioners. The net result is that the petitioners in this

case are denied the protection of the law which has been granted to parties in cases previous to this (which were cited in the original Petition for Writ of Certiorari). Since the Comptroller has in effect interpreted the statute to mean that he is the one who will decide when court approval is necessary and since the lower courts have approved the Comptroller's conduct, it is obvious that not only the petitioners but any other party in the future would be denied the equal protection of the laws in that it would never be known who would have the right to use the courts and who would be refused the right to use the courts. The Constitution does not give the Comptroller the privilege or discretion to adversely affect the rights of the petitioners.

Wherefore, Petitioners respectfully request your Honorable Court to issue an Order granting the Writ of Certiorari.

Respectfully submitted,
ARTHUR D. DALESSANDRO,
JOSEPH J. USTYNOSKI,
ANTHONY C. FALVELLO,
Attorneys for Petitioners.

CERTIFICATE OF COUNSEL

Arthur D. Dalessandro, certifies that he is one of the attorneys for the Petitioners and that the foregoing Petition is presented in good faith and not for delay, and he further certifies that the Petition is restricted to the grounds specified therein.

ARUTHR D. DALESSANDRO.